TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 434

J. CONGDON SEABURY, AS RECEIVER OF THE CITY NATIONAL BANK OF SUMTER, S. C., PETITIONER,

vs.

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF MOSES GREEN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS FOR SUMTER COUNTY OF THE STATE OF SOUTH CAROLINA.

PETITION FOR CERTIORARI FILED OCTOBER 1, 1934.

CERTIORARI GRANTED NOVEMBER 5, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

Statement of Case

This is an action commenced in the Court of Common Pleas for Sumter County by a summons and complaint dated the — day of April, 1933, by the Receiver of the City National Bank of Sumter, S. C., brought under the direction of the Comptroller of the Currency and pursuant to the national banking laws of the United States and instituted for the purpose of enforcing the statutory liability on four (4) shares of stock of the par value of Four Hundred ($400) Dollars of the City National Bank of Sumter, S. C., an insolvent institution, standing in the names of the infant defendants.

The stock in question was originally owned by Moses Green, now deceased, and as hereinafter set forth, was delivered to the general guardian for the infant defendants and registered in the names of Helen Green, Herbert Green and Allen Green, who are, and were, infants when the said stock was transferred, as a part of the residuary estate of the decedent.

Among other questions, the appellants raise the question that the executor, under the will of Moses Green, deceased, had not performed his duties, in that he had delivered to the infants bank stock, under the residuary clause of the will, hereinafter set forth.

The plaintiff is the receiver of the bank in question, and the defendants are the administratrix d. b. n., c. t. a. of the estate of the original owner of the stock, and the devisees and legatees of such owner.

The case was tried before the Court, without a jury, upon the pleadings and upon an agreed statement of facts, and resulted in the rendition of a verdict and judgment in favor of the plaintiff, as hereinafter set forth. From the judgment so rendered, and which was duly docketed, notice of intention to appeal was duly given on behalf of the infant defendants herein.

All parties were properly brought before the circuit court, and the only question before the court related to the liability of the defendants upon the admitted facts.

[fol. 2] IN COURT OF COMMON PLEAS OF SUMTER COUNTY

COMPLAINT

The plaintiff above named, complaining of the defendants herein, alleges:

1. That, upon information and belief, Moses Green departed this life on or about the 17th day of March, 1927, leaving of force his last will and testament, which is of record in the Probate Court for Sumter County, wherein and whereunder Leon M. Green, as executor of said estate, duly qualified as such, entered upon the discharge of his duties, and has since been discharged.

2. That on or about April 15, 1933, Beatrice C. Green was duly appointed and has qualified as administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased, and is now active upon the discharge of her duties as such.

3. That, upon information and belief, the heirs at law and distributees of the estate of Moses Green, deceased, are Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, and Helen Green, Herbert Green and Allen Green, infant children of a pre-deceased son of the said Moses Green, to-wit: Harry Green.

4. That the City National Bank, of Sumter, S. C., a national banking association organized and existing under the Acts of Congress, at Sumter, S. C., and having fully issued capital stock of One hundred fifty thousand ($150,000.00) Dollars, divided into fifteen hundred (1500) shares of par value of One Hundred ($100.00) Dollars each, became insolvent on or about the 21st day of July, 1932, and its affairs were placed in the hands of the Comptroller of the Currency of the United States and the plaintiff, J. C. Seabury, was duly appointed and qualified as Receiver of said bank and is now active in the discharge of his duties as such.

5. That, due to the insufficiency of assets to pay the creditors of said insolvent bank, an assessment of One [fol. 3] Hundred ($100.00) Dollars per share of capital stock was subsequently ordered by the Comptroller of the Currency on or about August 26th, 1932, and the plaintiff, as Receiver, in pursuance of instructions of the Comptroller of the Currency, gave notice and made demand upon the shareholders of said insolvent bank, the defendants included in said notice and demand, requiring each shareholder to pay on or before October 3rd, 1932, the amount assessed on account of the shares of stock upon which said shareholders were individually liable.

6. That the said Moses Green was, prior to his death, a resident of the County of Sumter, said State, and his estate was duly administered upon in said County and State, and Beatrice C. Green has duly qualified as Administratrix D. B. N. C. T. A. in Sumter County.

7. That plaintiff is informed and believes that Leon H. Green, Alva I. Green, and Aaron H. Green are non-residents of the State of South Carolina, their exact whereabouts being unknown to plaintiff.

8. That plaintiff alleges upon information and belief that the said Leon H. Green, Alva I. Green and Aaron H. Green own certain real estate in Sumter County, said State.

9. That plaintiff is informed and believes that Ethel Green Blatt is a resident of Barnwell County, South Carolina, and that Beatrice C. Green, Helen Green, Herbert Green and Allen Green are residents of Florence County, said State.

10. That prior to his death the said Moses Green owned several shares of the capital stock of the said The City National Bank, and four shares of the said stock were transferred in the name of Helen Green, Herbert Green and Allen Green, who, plaintiff alleges on information and belief, are infants.

11. That notwithstanding the demand made upon the defendant Beatrice C. Green, as administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased, for the payment of the assessment upon the four shares of capital stock in The City National Bank of Sumter, S. C., for

[fol. 4] which assessment she is responsible as such, which assessment is now due, she has failed to pay the said assessment, or any part thereof, and this action is brought under the direction of the Comptroller of the Currency of the United States, and pursuant to the national banking laws of the United States, to enforce the defendant's liability thereon.

12. That the real and personal property in the hands of the defendants (other than the administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased) as heirs at law of the said Moses Green, deceased, is subject to the assessment as above set forth.

Wherefore, Plaintiff prays judgment:

1. Against the defendant Beatrice C. Green as administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased, in the sum of Four Hundred ($400.00) Dollars, together with interest thereon at the rate of seven per cent per annum from the 3rd day of October, 1932, and for the costs and disbursements of this action.

2. That any property now held by the defendants (other than the administratrix D. B. N. C. T. A. as aforesaid) as heirs at law of the said Moses Green, deceased, be subject to the payment of the indebtedness due as aforesaid.

Raymon Schwartz, Plaintiff's Attorney.

(Verified.)

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

ANSWER OF BEATRICE C. GREEN AS ADMINISTRATRIX D. B. N. C. T. A. AND AS GUARDIAN

The answer of Beatrice C. Green, as Administratrix D. B. N. C. T. A. of the Estate of Moses Green, deceased, and as Guardian for Helen Green, Herbert Green, and Allen Green, shows unto the Court:

I

That she admits the allegations of paragraphs 1, 2, 3, 6, and 7 of the complaint, and so much of paragraph 11 [fol. 5] thereof as alleges that demand has been made upon

her for the payment of the stock assessment in question, and that she has failed to pay the said assessment.

II

That she has no knowledge or information sufficient to form a belief with respect to the allegations of paragraphs 4 and 5 of the complaint, and therefore denies the same.

III

That she denies the allegations of paragraph 12 of the complaint.

IV

Further answering the complaint, she alleges that at the time of the death of the late Moses Green, and during the period that the estate of the said Moses Green was being administered, City National Bank continued in business, and, according to her information and belief, was throughout that time a solvent and going concern; that this condition continued until after the settlement of the estate of the said Moses Green, deceased; that a full accounting of the administration of the said estate was made by the executors of the will of the said decedent, and that upon such accounting, the said executors were duly discharged by the Probate Court of Sumter County; that at the time of the said accounting and discharge, according to the information and belief of this defendant, City National Bank was a going concern, and did not suspend business until long after the settlement of the said estate and the distribution of the assets thereof were effected; and this defendant is advised and believes and therefore alleges that neither the assets of the estate of Moses Green, deceased, nor the transferees of the four shares of stock described in paragraph 10 of the complaint, are liable for the extra statutory liability created under the laws of Congress; and that the said transferees of the said four shares of stock being minors at the time the transfer was made to them, and being still such, they are not personally liable for said extra statutory liability.

[fol. 6] V

Further answering the complaint, she denies that the said three children, Helen Green, Herbert Green, and Allen

Green, are or ever have been owners of the stock described in the complaint, and in that regard alleges that the stock transferred to them as alleged in the complaint was transferred without lawful authority, and that the said three minors, and this defendant as their guardian, had no legal capacity or right to accept the same, and that the said transfer represents an investment of funds of said infants to the extent of Four Hundred ($400.00) Dollars, in the said stock, and that the said investment was made without lawful authority, and is not binding upon the said infants.

Wherefore, the said defendant prays that as to her, in both of her aforesaid capacities, the complaint be dismissed, and that she be awarded her proper costs.

Samuel Want, Attorney for Answering Defendant.

Darlington, S. C., May 18th, 1933.

(Verified.)

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

ANSWER OF INFANT DEFENDANTS BY GUARDIAN AD LITEM

The answer of H. W. Hennig, as guardian ad litem for the infant defendants, Helen Green, Herbert Green, and Allen Green, shows unto the Court:

I

That by an order heretofore made in this cause, he was duly appointed guardian ad litem for Helen Green, Herbert Green, and Allen Green, to make and file the answer of the said defendants in this cause; that the said defendants are infants under the age of twenty-one years; that he has no knowledge or information sufficient to form a belief with [fol. 7] respect to any of the material allegations of the complaint, and therefore denies the same.

II

Further answering the complaint, he sets forth that he submits to the protection of the Court the interests of the said infant defendants, and on their behalf adopts as a part hereof the answer filed and served in this cause on behalf of Beatrice C. Green, Administratrix D. B. N. C. T. A. of

the estate of Moses Green, deceased, and as Guardian of Helen Green, Herbert Green, and Allen Green, in the belief that the same exonerates the infant defendants from all liability herein.

Wherefore, The said H. W. Hennig, as guardian ad litem for the infant defendants, Helen Green, Herbert Green, and Allen Green, prays that as to said defendants the complaint be dismissed with costs.

H. W. Hennig, Guardian ad Litem for Helen Green, Herbert Green, and Allen Green.

Darlington, S. C., May 31st, 1933.

(Verified.)

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

ANSWER OF LEON GREEN ET AL.

The defendants Leon M. Green, Alva I. Green, Aaron Green and Ethel Green Blatt, answering the Complaint of the plaintiff herein, allege:

For a First Defense:

That, upon information and belief, they deny that they are personally liable, or that the Estate of Moses Green is liable for any assessment for the four shares of stock transferred from the Estate of Moses Green to their co-defendants, Helen Green, Herbert Green, and Allen Green.

[fol. 8] For a Second Defense:

That if these answering defendants are liable for the payment of the said assessment as set forth in the Complaint, which, however, they expressly deny, that in equity they are entitled to have the lands and personal property now held and owned by the defendants, Helen Green, Herbert Green, and Allen Green, which they inherited from their grandfather, the late Moses Green, subjected to the payment of any judgment if obtained in this cause.

Wherefore, these defendants pray for such relief as may be just and equitable.

Solomon Blatt, Attorney for Answering Defendants.

(Verified.)

In Court of Common Pleas of Sumter County

Additional Statement of Fact

The Agreed Statement of Facts upon which this case was tried is incorporated in the opinion of the Circuit Judge. The following additional fact, taken from the records of the Probate Court in regard to the estate of the testator and the guardianship of the infant defendants, was discussed before the Circuit Judge:

The personal property of the testator included in the final distribution which embraced the stock now in question included other personal property of a value sufficient to have enabled the executors to make distribution to the three minors in question in cash, in an amount equal to the par value of the bank stock involved in this proceeding.

The aforesaid records further show that the accounting made by the executors of the testatbr's will was an ex parte proceeding, but pursuant thereto the executor applied for a discharge, which notice for application was duly published in a newspaper for said County, having a general circulation, and the general guardian of the infant defendants made no objection to the discharge of the executor.

When the estate was finally settled and the same distributed amongst the devisees and legatees under the will, [fol. 9] the infant defendants' share, including the bank stock in question, was received by and receipted for by Beatrice C. Green, mother of and general guardian for the infant defendants, who accepted the same on behalf of the infant defendants, including the four (4) shares of stock in question and thereafter received the dividends arising therefrom and accounted to the Court therefor, as a part of the maintenance and support of the infant defendants.

The value of the personal property delivered to the infants and to their duly appointed general guardian under the residuary clause of the Last Will and Testament of Moses Green was equal in value to an amount far in excess of the value of the four shares of stock which is the subject of the litigation herein.

Will of Moses Green

State of South Carolina,
County of Sumter:

In the Name of God, Amen!

I, Moses Green, of the County of Sumter, said State, being of sound and disposing mind, memory and understanding, and being mindful of the very great uncertainty of life and of the certainty of death, do hereby make, ordain, publish and declare this to be my last will and testament, hereby expressly revoking all other wills by me heretofore made.

Item One: It is my will, and I so direct that my executor hereinafter named shall pay all just debts duly established and proven against my estate as soon after my demise as it is possible for him to do so.

Item Two: I give, devise and bequeath unto my beloved daughter, Ethel Green Blatt, those two store buildings on East Liberty Street, in the City of Sumter, S. C., being described and designated as numbers sixteen and eighteen, to her, her heirs and assigns forever. In devising unto her these two stores, it is my desire, but not mandatory upon [fol. 10] her, that she retain title to the same and use the income in rents therefrom as her personal wants and needs may warrant. And I further give, devise and bequeath unto my said daughter, Ethel Green Blatt, all of the furniture, fixtures, silverware, chinaware, and all other household goods of every nature, kind or description in my residence contained at the time of my death.

Item Three: I give, devise and bequeath unto the three children of my eldest and beloved son, Harry Green, namely: Helen Green, Herbert Green and Allen Green, in equal shares and proportions, all of that piece, parcel or lot of land in the City and County of Sumter, said State, measuring eighty-five (85) feet on West Hampton Avenue of said City, and running back with an uniform width to a depth of one hundred and ninety-six (196) feet, the said lot being a part of my home place, being the Western portion thereof.

Item Four: It is my will, and I so direct, that the watch which I now wear, formerly belonging to my dear son, Hubert Green, shall be given to my beloved grandson, Solomon Blatt, Jr.

Item Five: Realizing the enormous importance of education for success in life, and desiring that my grandchildren shall be given the equal advantages that I endeavored to give to my own children, it is my will, and I direct that my executor hereinafter named shall invest, in safe interest bearing securities the sum of Two Thousand ($2,000.00) dollars for each of my grandchildren living at the time of my death, this money to be available for educational purposes to each grandchild as soon as he or she enters college, each of my said grandchildren to have available for educational purposes the sum of Two Thousand ($2,000.00) dollars, and the profits arising from the investment of said fund in securities as aforesaid; but in the event that any of my said grandchildren shall not avail themselves, on account of death, or otherwise, of the use and benefits of the moneys herein provided for educational purposes, then the [fol. 11] sum herein provided therefor, or the unused portion thereof to revert to my estate.'

Item Six: For the reason that I do not desire to indefinitely tie up my estate, I am not herein making provisions for the education of any grandchildren that may be born after my death; but, God having blessed me with good fortune, I am leaving to each of my children a sufficient amount of property and money to get them established in this world, and I desire to enjoin them to in nowise neglect the full and complete education of their children, and it is my will and desire and fondest hope that each of my children shall give their children every educational advantage possible.

Item Seven: It is my will, and I so direct, that my heirs designated in this will and referred to specifically in the residuary clause hereof shall have the right to determine the course that my executor shall pursue in regard to the business that I have worked so hard for so many years to establish. The determination shall be arrived at by a majority vote of my heirs, each one of my surviving children being entitled to one vote, and the legal representative of the children of my deceased son, Harry, to one vote. In the event of the sale of the business, or in the event of the continuance thereof, the proceeds or profits shall be divided amongst my heirs as is more particularly set out in the residuary clause of this my will. In the event of the continuance of the business only the profits arising therefrom

are to be divided, and this is to be done annually from the date that my executor takes charge, and at the end of each fiscal year thereafter my executor shall have the right, by the same method as above set forth, to determine the disposition of the business.

Item Eight: I give, devise and bequeath unto the Trustees of Congregation Sinai located in the City of Sumter, S. C., and to their successors in office, the sum of four hundred dollars to be held by them in trust for the purpose of investing the principal and paying out of the income thereof so [fol. 12] much thereof as may be necessary to provide permanent, perpetual, and proper care of the graves in my plot in the Jewish Cemetery in the City of Sumter, S. C.

Item Nine: All the rest and residue of my estate, real, personal or mixed, of which I may be possessed or entitled to at the time of my death, shall be divided as follows: One-fifth thereof to the children of my deceased son, Harry, namely: Helen, Herbert and Allen; and one-fifth thereof to each of my beloved children, Leon M. Green, Alva I. Green, Ethel Green Blatt, and Aaron Green, share and share alike, the child or children of a predeceased child to take and have that portion to which its parent would have been entitled if living; but in the distribution and division of my estate the store building in which my present business is now being conducted shall not be divided among my respective heirs until the business is discontinued.

Item Ten: I hereby nominate and appoint my beloved son, Leon M. Green, executor of this my last will and testament, and I charge him with the responsibility of carrying out strictly the provisions of this my said last will and testament, and I enjoin him, in the event that my heirs determine to continue my business, to faithfully and zealously maintain the same in a prosperous and flourishing condition for his benefit and for the benefit of my other heirs.

Witness my hand and seal on this the 23rd day of April, A. D. 1925.

Moses Green (L. S.)

(Duly Witnessed.)

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

DECREE

The plaintiff, J. C. Seabury, as the duly appointed and qualified Receiver of The City National Bank, a national banking association, brings this suit against the defendants upon a stock liability on four shares of stock standing in [fol. 13] the names of Helen Green, Herbert Green and Allen Green, infants.

The complaint alleges that Moses Green, late of the County of Sumter, departed this life on or about the 17th day of March, 1927, leaving of force his last Will and Testament, filed in the office of the Judge of Probate for Sumter County.

That under and by virtue of the said Will, Leon M. Green was named as executor and as such entered upon the discharge of his duties and thereafter, was duly discharged as executor of the said estate.

That thereafter, to-wit, on August 26th, 1932, the Comptroller of the Currency of the United States levied a stock assessment of one hundred per cent upon all shares of stock owned by the stockholders of the said bank. That the estate of Moses Green having been settled prior to the levy so made by the Comptroller, that upon a petition to the Probate Court for Sumter County, Mrs. Beatrice C. Green was duly appointed and qualified as administratrix D.B.N.-C.T.A. of the estate of Moses Green, deceased.

That the devisees and legatees of the said Moses Green were Leon M. Green, Alva I. Green, Aaron H. Green and Ethel Green Blatt, adult children of the said Moses Green, and Helen Green, Herbert Green and Allen Green, the children of a predeceased son of the said Moses Green. That pursuant to the terms of the said Will, four shares of stock were transferred in the names of the said Helen Green, Herbert Green and Allen Green, infant grandchildren of the said Moses Green. That this suit was brought by reason of the stock assessment so ordered by the Comptroller and under his directions and under the national banking laws pursuant thereto.

And the plaintiff demands judgment against the administratrix D. B. N. C. T. A., of the estate of Moses Green, deceased, for the indebtedness due by reason of the stock assessment so levied by the Comptroller, and against all of

the defendants that the lands or personal property taken by [fol. 14] them, under the terms of the will of Moses Green, deceased, be subjected to the payment of the said stock assessment.

Mrs. Beatrice C. Green is the duly appointed and general guardian for her infant children, Helen Green, Herbert Green and Allen Green, and she was made a party to this suit.

* * * * * * *

The Answer of the administratrix D. B. N. C. T. A. and of Mrs. Beatrice C. Green, as guardian for Helen Green, Herbert Green and Allen Green, admitted that she had failed and refused to pay the said assessment.

The Answer denied the formal parts of the complaint relating to the insolvency of the Bank and the stock assessment having been levied. However, these questions were not raised before me as the case was submitted to me upon an Agreed Statement of Facts hereinafter set forth.

The Answer of the said administratrix D. B. N. C. T. A. and as guardian alleged that during the administration of the said estate by the executor and for several years thereafter, the City National Bank was a going concern and that the executor made a full accounting of the administration of the estate of the decedent and upon such accounting the executor was duly discharged by the Probate Court for Sumter County, and therefore the answering defendant in both capacities denied liability upon the said stock.

Further answering, the defendant denied that Helen Green, Herbert Green and Allen Green, being minors, were ever the owners of the four shares of stock and therefore denied liability thereon.

* * * * * * *

Answer of the duly appointed Guardian ad Litem, for the infant defendants, was formal, submitting their rights to the protection of the Court and raised no special defense.

* * * * * * *

The Answer of the adult heirs denied, first, that the estate of Moses Green was liable for the said stock assessment, and second, that the property which they took respectively as devisees and legatees of the estate of Moses Green,

[fol. 15] deceased, should not be subjected to the payment of the stock assessment.

As an affirmative defense against their co-defendants, Beatrice C. Green as guardian for her infant children, Helen Green, Herbert Green and Allen Green, and against the infant children, Helen Green, Herbert Green and Allen Green, that should it be held that their estate so inherited from their deceased father should be liable for the payment of the said stock assessment (which they specifically deny), then in equity the Court should order that the estate, taken by the said infant defendants as devisees and legatees of the said Moses Green, deceased, should first be subjected to the payment of the said liability before they, the adult heirs, should be called upon to contribute out of their separate estates as devisees and legatees of their late father.

* * * * * * *

The case was submitted to me upon an Agreed Statement of Facts as follows:

1. It is agreed that this case should be tried before Judge Mann at Sumter without a jury.

2. It is further agreed that the late Moses Green, a citizen of Sumter County, South Carolina, departed this life on or about the 17th day of March, 1927, leaving of force his last will and testament, which was duly filed for probate in the office of the Judge of Probate for Sumter County, whereunder Leon M. Green, the named executor, duly qualified and entered upon the discharge of his duties.

3. That Beatrice C. Green was, on or about April 15, 1933, duly appointed and qualified as administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased, and is now engaged upon the discharge of her duties as such.

4. That the heirs and distributees at law of the estate of Moses Green, deceased, are Leon M. Green, A. I. Green, A. H. Green, E. G. Blatt, and Helen, Herbert, and Allen Green, the last three being infant children of a predeceased son of the said Moses Green, to-wit, Harry Green. And [fol. 16] that Beatrice C. Green is the duly appointed and qualified general guardian of the said three infant children named.

5. That the City National Bank of Sumter, a national banking association, had a capital stock of $150,000.00, divided into 1,500 shares of $100.00 each, and that the said Bank became insolvent on or about the 21st day of July, 1932, and its affairs were placed in the hands of J. C. Seabury, the duly appointed and qualified Receiver of the said Bank.

6. That there was an insufficiency of assets to pay the creditors of said insolvent Bank, and an assessment of $100.00 per share on the capital stock was ordered by the Comptroller on August 26, 1932, and the Receiver gave due notice thereof and demanded payment of the stockholders, which said payment was to be made on or before October 2, 1932. That after the appointment of Beatrice C. Green as administratrix D. B. N. C. T. A. of the estate of Moses Green, deceased, that demand was made upon the said administratrix for the payment of the stock assessment upon four shares of stock standing in the names of Helen, Herbert and Allen Green, infant defendants herein. That the said administratrix has failed and refused to pay the same.

7. That L. H. Green, A. I. Green and A. H. Green are non-residents of the State of South Carolina. Certain real estate of theirs, respectively, has been attached in this proceeding.

8. That included among the assets of the estate of the late Moses Green, deceased, were a number of shares of bank stock in the said City National Bank of Sumter, S. C., which said stock constituted part of the residuary estate of the testator, and was distributed by the executor under the terms of the residuary clause of the will, four shares of said stock being transferred to the three infants named herein, the same appearing on the books of the said bank while it was a going concern. That at the same time there was [fol. 17] transferred on the books of the bank to the adult heirs named herein their prorata number of said shares of stock under the provisions of the will.

9. That the executor has been duly discharged, and at the time of the said transfer of stock the said bank was a going concern, and no demand was made upon the executor for the payment of any bank stock liability.

10. That the adult heirs of the said Moses Green, deceased, have paid their respective stockholders liability upon the shares of stock standing in their names respectively, arising by reason of the insolvency of the said City National Bank of Sumter. And although due demand has been made, neither the infant defendants, the administratrix D. B. N. C. T. A., nor the adult heirs have paid the stockholders liability referred to in the Complaint, and the said assessment still remains open and unpaid.

11. That there remains in Sumter County real estate undivided, in which all of the heirs have an interest, of a value far in excess of the total amount of bank stock divided among the heirs, and the value of the infants' interest in said real estate far exceeds the face amount of the bank stock appearing in their names on the books of the bank.

12. That this suit is brought by the plaintiff, as the duly appointed Receiver of the City National Bank of Sumter, S. C., after a stock assessment was levied by the Comptroller of the Currency of the United States, the said suit being brought under the direction of the Comptroller of the Currency of the United States and pursuant to and under the national banking laws of the United States to enforce the liability upon the said four shares of stock.

* * * * * * *

As a stipulation, counsel representing all of the parties to this suit agreed as follows: All parties agreed without notice to either or any of the others, that either or any may use any and all of the records pertaining to, first, the Estate of Moses Green, deceased, whereby and whereunder, [fol. 18] Leon M. Green was executor thereof; second, the guardianship proceedings had in connection with the estates of Helen, Herbert and Allen Green, infants; third, the administration of the estate of Moses Green, deceased, whereby Beatrice C. Green was appointed administratrix D. B. N. C. T. A., of said estate; all of said papers and proceedings being on file in the office of the Judge of Probate for Sumter County.

* * * * * * *

Questions in this case were exhaustively argued by the attorneys representing the respective parties. Samuel Want, Esquire, representing the administratrix, the gen-

eral guardian for the infant defendants, and the infant defendants, raised the question that the executor, under the will of Moses Green, deceased, had not performed his duties in that he delivered to the infants bank stock, with constructive knowledge that they could not assume liability thereon, and, therefore the transfer was null and void.

By virtue of the residuary clause of the Will of Moses Green, deceased, under which the stock was transferred, the testator devised all of his property, real and personal, to his four living children and to the infant defendants in this case, the children of his predeceased son, Harry Green, *each to take an undivided one-fifth thereof.* From the record it appears that the executor carried out the exact terms of the provision of the said Will and divided the estate in kind, each taking one-fifth thereof in the personal property and the defendants held as tenants in common (other than Beatrice C. Green, as guardian and as administratrix aforesaid) the real estate of the testator, in the same proportions.

I find, therefore, as a matter of fact, that the executor was not derelict in his duty in transferring the stock to the infant defendants, but that he specifically carried out the terms of his Father's Will and such conduct on his part in his final accounting to the Probate Court was ratified and confirmed.

Under the authority of Rutledge v. Stackley et al., 162 S. C., page 170, there can be no doubt that a personal judg-[fol. 19] ment against infants upon a stock assessment liability cannot be enforced against them personally, that is a personal judgment cannot be obtained against them for bank stock standing in their names in the event that an assessment is levied. The assumption of such liability is voidable and as the Court said in this case, "The transferees, being minors, were without legal capacity to assume the obligation. Upon coming of age they would have an election either to affirm or avoid the entire transaction. In the meantime the transfer of the stock, having resulted to their disadvantage, the law will avoid it for them."

And in the same case the Court uses this language, "We do not intend by this decision to hold that, where bank stock appears in the name of a minor, there is no redress for depositors. That conclusion does not follow."

Where then should the liability rest?

It was held in the case of Aldrich v. Bingham (D. C. N. Y., 1904) 131 F. 363, a transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children, under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency.

It was held in Foster v. Wilson, 75 Fed. 797: A father buying stock in the names of his minor children becomes himself liable to assessment as a shareholder; and the assent of a minor after becoming of age, after the assessment but before suit is brought, does not relieve the father from liability.

And in the case of Early v. Richardson, 280 U. S., 496, the Court held where a father purchased stock and had the same transferred in the names of his infant children, that he thereby assumed the responsibility in the event an assessment was thereafter levied.

From the authorities above cited it would appear that if the testator, during his lifetime had transferred the stock to his infant grandchildren, and had survived to this day, [fol. 20] that he would be liable for the assessment so levied by the Comptroller.

It appears to me, therefore, that the administratrix D. B. N. C. T. A., who is the legal representative of the testator would stand in his shoes, for as was stated in the case of Smith v. Byers, 102 S. C., 218, "In fact he (the executor) was the testator (Henry Clark) in possession and he could not claim any rights inconsistent with his duty."

It therefore follows, that if the testator were living he would be responsible for the assessment, so far as the four shares, which were placed in the names of his infant grandchildren, are concerned.

The Court having avoided the contract for the infants, the stock is as though the same had never been transferred from the estate of the testator, Moses Green, and the administratrix D. B. N. C. T. A., being in fact the testator under the authority of Smith v. Byers, supra, is the owner of the said four shares of stock.

The estate of Moses Green, in contemplation of law, being liable for the four shares of stock, the administratrix D. B. N. C. T. A., is liable for the assessment under the

case of Matteson v. Dent, 176 U. S., 521, holding, "That a shareholder's liability (upon bank stock) continues after his death until there is a transfer of his stock upon the books of the bank * * * notwithstanding the stockholder died and his estate was distributed and settled prior to the insolvency of the bank, the estate is still liable in the absence of such transfer of stock, and the estate may be followed in the hands of the distributees and legatees * * * and the whole amount of the assessment enforced to the extent of the distributive share received."

There can be no difference in the liability of the estate of Moses Green to answer for the stock assessment so levied by the Comptroller upon the stock transferred to the infants in this action, even though the assessment was made after the testator dies and the executor discharged.

Under this section the estate of a deceased shareholder in a national bank is liable on the stock held by it, though [fol. 21] insolvency of the bank occurs and assessment on the policy is made after his death. Miller v. Hammer (C. C. A. Del, 1920), 269 F. 891, reversing Hammer v. Miller (D. C., 1920), 263 F. 965.

And this doctrine is the law of this State as enunciated by our Supreme Court in the case of McNair v. Howle, 123 S. C., page 252, holding in brief that the administrator D. B. N., was a proper and necessary party to a suit upon a contract of the intestate; and that the heirs at law of the intestate were proper parties to subject the intestate's lands, which they inherited as his heirs at law, to the payment of his, the intestate's, obligations. This rule has been affirmed in the case of Arnett v. The Columbia Theological Seminary, 168 S. C., page 272.

Under these last two mentioned authorities it would appear that the lands held by the devisees of Moses Green, deceased, is subject to the indebtedness due by his estate upon the four shares of stock standing in the names of his infant grandchildren.

From the undisputed testimony it is admitted, and I so find, that the infant defendants received under the Will of their late grandfather, real and personal property far in excess of the assessment levied by the Comptroller, which personal property is now held by their Mother as their duly appointed guardian, and which real estate they own as tenants in common with the other named defendants in

this action (other than Beatrice C. Green, administratrix D. B. N. C. T. A., and as guardian for her children). It is admitted that the bank stock of the City National Bank, owned by the testator was divided in kind into five equal parts, in accordance with the residuary clause of the said Will, and that each of the adults to this action (except the administratrix aforesaid and guardian) received from the executor and there was transferred upon the books of the bank to each of them, respectively, the same number of shares as was transferred to the infant defendants jointly in this action, upon which the adults to this action, who had [fol. 22] not theretofore disposed of their stock, have already paid their respective stock assessments.

It, therefore, appears to me that in equity and good conscience, before the real and personal property of Leon M. Green, Alva I. Green, Aaron H. Green and Mrs. Ethel Green Blatt, which they took and hold now as devisees and legatees, respectively, of Moses Green, deceased, be subjected to the payment of the stock assessment upon the four shares of stock standing in the names of the infant defendants, that the real and personal property of the infant defendants which they own, or which is held for them by their guardian, which they took as devisees and legatees under the Will of the late Moses Green, should first be exhausted.

This equitable doctrine, which I have invoked in this case is sustained and enunciated in 7 C. J., page 770, holding, "That a minor does not have the necessary legal capacity to become a stockholder in a national bank, and is not personally liable for the assessments on stock standing in his name, or in the name of a Guardian, *although it seems that where the stock is left by Will or descends to the minor the estate in the hands of a guardian is liable* for the assessment." This doctrine has been recognized as the law in the case of Clark v. Ogilvil, 111 Ky., 181, 63 S. W., 429. See also U. S. Ann. Code, Title 12, Section 10, page 127.

It is therefore ordered, adjudged and decreed, That the plaintiff, J. C. Seabury, as Receiver of The City National Bank of Sumter, S. C., a national banking association, have judgment against Beatrice C. Green, as administratrix D. B. N. C. T. A., of the estate of Moses Green, deceased, in the sum of Four Hundred Dollars (400.00) with interest thereon from October 3rd, 1932, at the rate of seven per

cent per annum, and for the costs and disbursements of this action.

It is further ordered, adjudged and decreed, That real and personal property of the defendants, Helen Green, [fol. 23] Herbert Green and Allen Green, which they took as devisees and legatees of Moses Green, deceased (whether such property now stands in their names respectively, or in the name of their duly appointed and qualified guardian) be first subjected to the payment of the judgment hereinabove ordered in favor of the said J. C. Seabury, as Receiver against Beatrice C. Green, as administratrix D. B. N. C. T. A., of the estate of Moses Green, deceased.

It is further ordered, adjudged and decreed, That in the event that the real and personal property owned by the said Helen Green, Herbert Green and Allen Green, which they took as devisees and legatees under the Will of their late Grandfather, Moses Green, whether such real or personal property stands in their names, respectively, or in the name of their guardian, be insufficient to pay the said stock assessment, then and in that event the real and personal property of the said Leon M. Green, Alva I. Green, Aaron H. Green and Mrs. Ethel Green Blatt, as devisees and legatees of Moses Green, deceased, shall be subjected to the payment of the judgment hereinabove ordered in favor of the said J. C. Seabury, as Receiver aforesaid against Beatrice C. Green, as administratrix D. B. N. C. T. A., of the estate of Moses Green, deceased.

M. M. Mann, Presiding Judge.

Nov. 28, 1933.

IN COURT OF COMMON PLEAS OF SUMTER COUNTY

EXCEPTIONS

I

It is respectfully submitted that the Circuit Judge erred in holding that under the residuary clause of the will in question it was incumbent upon the executor to so distribute the residuary estate as to deliver to the infant appellants, in kind, the four shares of bank stock involved in this cause.

[fol. 24] II

It is respectfully submitted that the Circuit Judge erred in holding that the executor of the testator's will had the right and/or duty to transfer to the infant appellants, as a specific legacy or legacy in kind, the four shares of bank stock involved therein.

III

It is respectfully submitted that the Circuit Judge erred in holding that the approval by the Probate Court of Sumter County of the final account of the executor of the testator's will, showing the distribution in kind to the infant appellants of the bank stock in question, constituted a ratification and confirmation of the action of the executors.

IV

It is respectfully submitted that the Circuit Judge erred in holding that under the agreed facts in this case, the administratrix d. b. n., c. t. a. of the testator's estate stands in the shoes of the testator, and is subject to judgment, to be enforced against the estate of the testator in the hands of his legatees and devisees, for the extra constitutional and statutory liability attached to the bank stock in question.

V

It is respectfully submitted that the Circuit Judge erred in holding that the real and personal property of the infant appellants, which they took as devisees and legatees of the testator, may be impounded and sold for the satisfaction of the claim of the plaintiff herein.

VI

It is respectfully submitted that the Circuit Judge erred in holding in effect that the infant appellants may be held liable for the payment of the claim set forth in the complaint in this cause.

[fol. 25] In Court of Common Pleas of Sumter County

Notice of Proposed Case

To Raymon Schwartz, Esq., Attorney for the Plaintiff, and to George D. Levy, Esq., and Solomon Blatt, Esq., Attorneys for Certain Defendants:

You will please take notice, That the defendant, Beatrice C. Green, as Administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, and as Guardian of Helen Green, Herbert Green, and Allen Green, and H. W. Hennig, as Guardian ad Litem for the infant defendants Helen Green, Herbert Green, and Allen Green, propose the foregoing as the Case and Exceptions upon which, when printed and filed as required by law, this case shall be heard in the Supreme Court.

Samuel Want, Attorney for Appellants.

Darlington, S. C., January 6th, 1934.

Case for appeal settled by agreement of counsel.

[fol. 1] THE STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. C. SEABURY, as Receiver of the City National Bank of Sumter S. C., a National Banking Association, Respondent,

against

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A. of the Estate of Moses Green, Deceased; Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, Beatrice C. Green, as Guardian for Helen Green, Herbert Green and Allen Green, and Helen Green, Herbert Green and Allen Green, Defendants

In re BEATRICE C. GREEN, Administratrix D. B. N., C. T. A. of the Estate of Moses Green, Deceased; Beatrice C. Green as Guardian for Helen Green, Herbert Green, and Allen Green, and H. W. Hennig as Guardian ad Litem for Helen Green, Herbert Green and Allen Green, Appellants

Appeal from Sumter County. M. M. Mann, Judge

Case No. 703

Opinion No. 13880

Filed June 26, 1934

Reversed.

Samuel Want, of Darlington, for appellants.
Raymon Schwartz, of Sumter, for respondent.
George D. Levy, of Sumter, and Solomon Blatt, of Barnwell, for certain interested defendants.

W. C. COTHRAN, AAJ.:

Moses Green, late of the County of Sumter, departed this life on or about March 17, 1927. Being the owner of considerable property and desiring to make disposition of same, he left a will with full directions therefor to his son, Leon M. Green, as executor. The heirs of the testator and distributees under his will were three sons, one daughter

and three grandchildren, the latter the children of a deceased son.

Under the terms of the will several direct devises and bequests were made, the residuary clause appearing in Item 9. By the terms of this Item it was provided that all the rest and residue of his estate, consisting of real, personal and mixed property, should be divided one-fifth to the three children of his deceased son and one-fifth to each of his four children, they being of age. Included in the rest and residue of his property directed to be divided under this Item was a considerable amount of both real and personal property and in the personal property were twenty shares of stock of the City National Bank of Sumter. In [fol. 2] carrying out the directions in the will, the executor divided the bank stock into five portions, giving to the four adult children four shares each and allotting to the three grandchildren a like number of shares. New certificates of stock were issued from the books of the bank to the new owners, a certificate for four shares being issued to Helen, Herbert and Allen Green, the three grandchildren.

Beatrice C. Green was duly appointed the general guardian for these minor grandchildren and the certificate for four shares of the bank stock was delivered to her as such general guardian, although the certificate was issued in the names of the three children. The bank stock appeared to be a good investment, dividends upon same being collected by the guardian and used for the support and maintenance of the children.

Leon M. Green duly attended to his duties as executor, rendered his final accounting and was discharged. The exact date of his discharge is not shown but it is alleged and not denied that the discharge took place several years before the failure of the City National Bank and when the bank was apparently in a sound financial condition.

On July 21, 1932, more than five years after the death of Moses Green the City National Bank of Sumter was declared insolvent and its doors were closed. Demand was made upon the stockholders, as appeared from the stock book of the bank as of the date of closing, for their statutory liability and Beatrice C. Green, as guardian, was asked to pay the sum of $400.00, this being $100.00 per share on the four shares of stock issued to the children, the par value of the stock being $100.00 per share. The guardian refused

to make payment and thereafter she, Beatrice C. Green, was duly appointed administratrix debonis non, cum testamentum annexo, of the estate. All reference to her hereinafter will be considered as administratrix in that capacity.

Upon her appointment as administratrix, which appointment was solely for the purpose of a suit to follow, all assets of the estate having long since been distributed, the receiver brought this suit during the month of April, 1933. All of the heirs at law were made parties defendant as was Beatrice C. Green, as administratrix and guardian. The minor defendants, the three grandchildren, were represented by H. W. Hennig as their guardian ad litem. The object of the suit was to obtain judgment against the administratrix for $400.00 and interest upon the stock liability and to subject any property held by the heirs of Moses Green to the payment of the judgment if, and when, obtained. All of the Defendants filed answers to the complaint, the minors being duly represented by their guardian ad litem who filed an answer for them. Upon the pleadings as filed and upon an agreed stipulation of facts the cause was submitted to the Circuit Judge for determination, no jury being requested by any of the parties.

The decree of the Circuit Judge was in favor of the Plaintiff and from the judgment, as rendered, the defendants, Beatrice C. Green, as administratrix and as guardian for the three minor defendants, and H. W. Hennig, as guardian ad litem for said minor defendants, have prosecuted this appeal. The other defendants did not appeal.

The decree of the Circuit Judge, following the case of Rutledge v. Stackley, 162 S. C. 170, held that no personal judgment could be enforced against the three minor children by reason of the stock standing in their names. Assuming that there must be a liability somewhere the Circuit Judge then asks himself the question, "where, then, should the liability rest?" Answering his own question with the premise that if the testator were living he would be responsible for the four shares of stock which were placed in the names of the minor grandchildren, he holds that the stock is as though it had never been transferred from the estate of the testator and that the administratrix is the [fol. 3] owner of the four shares of stock. Finding from the agreed statement of facts that the minor defendants received under the will real and personal property far in

excess of the stock liability, which personal property is held by their guardian the real estate being held as tenants in common with the other heirs, the Circuit Judge then holds that all of the estate of Moses Green is liable for the stock assessment but that the property give- to the minor children should be first exhausted before recourse can be had against the property of the other beneficiaries.

In holding that the estate of Moses Green is, in contemplation of law, liable for the four shares of stock and that the administratrix is liable for the stock assessment, the Court cites the following extract from the case of Matteson v. Dent, 176 U. S. 521:

"That a shareholder's liability (upon bank stock) continues after his death *until there is a transfer of his stock upon the books of the bank* • • • notwithstanding the stockholder died and his estate was distributed and settled prior to the insolvency of the bank, the estate is still liable *in the absence of such transfer of stock,* and the estate may be followed in the hands of the distributees and legatees • • • and the whole amount of the assessment enforced to the extent of the distributive share received." (Italics supplied.)

We must express our inability to follow the reasoning of the Circuit Judge in this portion of his decree nor do we think the above citation is authority for his position.

After holding that the minor children are not liable for the stock assessment he proceeds to impress their property with liability for the judgment. "There may be a slight legal distinction between the two," as remarked by one of the old-time Judges of this State under a rather different state of facts, "but the sensation is very much the same."

We cannot see how the interests of the minors can be held solely responsible for the judgment rendered and must disagree with the Circuit Judge in so holding. See the case of Conner v. McSween, 164 S. C. 438. But another feature of the case here presents itself and that is, is the estate of Moses Green liable?

The cases in this State upon this subject are all of a different nature from the present one. By referring to some of these we find:

Conner v. McSween, supra. In this case there is a full discussion of the subject and a citation of the leading au-

thorities. The Defendant in this case made a voluntary transfer of three hundred shares of bank stock to a trustee for the benefit of his three minor children and the new certificate was issued in the name of the trustee. About eighteen months thereafter the bank closed and in a suit to recover the statutory liability against the Defendant, the transferror of said stock, this Court held him liable. The Circuit Judge had exonerated the Defendant relying largely upon the opinion in

Loomis v. Verenes, 141 S. C. 145. In that case two brothers had transferred certain bank stock to the wife of one of the brothers. The bank failed in about eighteen months thereafter and in a suit against the brothers for stock liability the Court held that they were not liable. The very important distinction was made that in the McSween case the transfer was made to minors and in the Loomis case the transfer was made to a person sui juris with no notice of the bank's insolvency and with no purpose to evade statutory liability.

Rutledge v. Stackley, supra, holds that the estates of minors in the hands of trustees cannot be held liable for the stock liability. This is on the ground, as held in Fischer v. Chisolm, 159 S. C. 395, that the liability is contractual in its nature and that minors cannot assume the contract. See [fol. 4] also Early v. Richardson, 280 U. S. 496. If the estate of the minors in the hands of a trustee could not be made liable for a claim of stock liability no more could such estate be made liable if in the hands of a guardian.

No one of these cases exactly fits the facts in the present case. Moses Green did not make the transfer to his minor grandchildren. They took the stock as allotted to them by the executor in making a division of the estate under the residuary clause contained in the will. The instructions for division of the residuary estate into five parts nowhere said that the grandchildren should receive any portion of the bank stock. This allotment to the grandchildren was solely a matter transacted by the executor in what he considered the orderly and authorized division of the estate. As this transfer was not the act of the testator, then the estate of the testator is not liable therefor. That the executor could not make a separate and independent contract tending to bind the estate of the testator is too well established to warrant the citation of authority in support thereof.

If, therefore, as shown above, the estate of the grandchildren is not liable, for the reason that they could not assume the contractual obligation, and the estate of the testator is not liable, for the reason that the transfer to the grandchildren was not made by him and the executor had no right to make a contract binding the estate, it follows that no liability for this contingent indebtedness can be placed upon any one or more of he Defendants.

It might also be given as a reason for non-liability of the estate that during the administration of the estate by the executor no claim on the part of the depositors of the City National Bank of Sumter existed in their favor against the estate of Moses Green. All debts against the estate were duly paid, the executor was discharged without objection on the part of anyone, and we can see no reason why a claim which did not exist during the orderly administration of the estate should now be brought up years after the estate closed and liability therefor sought to be lodged against the estate of the testator. The Court always looks with favor upon the orderly administration of estates in conformity with the Statute law pertaining thereto.

It does not seem that either the act of Congress or the State Statute imposing liability on stockholders in banks is sufficient to cover the very peculiar facts existing in this case.

Before concluding this opinion it may be well to refer to some other cases which have application to the main point herein involved.

The case of Matteson v. Dent, supra, contains expressions both for and against the rule as herein expressed. The quotation from that case, above set forth, especially the italicized portion, implies quite a distinction where the stock has been actually transferred on the books of the bank. We think, however, that the controlling feature of that case was the existence of the Minnesota Statute under the terms of which liability for the stock assessment was absolutely fixed.

The case of Witters v. Sowles, 32 Fed. 130, although decided some years ago, in 1887, contains statements quite appropriate to the present case. We take from that case the following extracts:

"None of the liabilities of the bank to meet which this assessment is made, are shown or claimed to have been incurred during the life of the testator. Therefore this is not

a contingent claim for which the assets can be pursued under the laws of the state relating to such claims".

Also,

"So far as appears or is claimed, all the assets of the estate in the hands of those sought to be charged for them were received before any of the liabilities of the bank now in question were created, and most of them several years before".

[fol. 5] If it be argued that the statutory liability cannot be destroyed, that it must exist against someone, we refer to the case of Williams v. Cobb, 242 U. S. 307. In this case liability for the assessment was denied in toto under this theory of the complaint:

"The theory upon which this suit was commenced is that the transfer of the twenty shares of bank stock by Cobb and Spensley, as executors, to themselves, as trustees for Catherine Monohan, is void; that the stock is as if it had never been transferred at all and is therefore an undistributed asset of the estate of Mrs. Cobb, and that the defendant, having received as legatee and distributee much more than the amount of the assessment, is liable under the Wisconsin statute to the Receiver for the assessment, a debt of the estate, all the other assets having been distributed before the failure of the bank."

The cases of McNair v. Howle, 123 S. C. 252, and Columbia Theological Seminary v. Arnette, 168 S. C. 272, are not applicable to the present case for the reason that the debts existing in those cases were contracted prior to the death of the testator and were established as debts at the date of death.

The judgment of the Circuit Court is, therefore, reversed and the complaint dismissed under Rule 27 of this Court.

Blease, CJ., Stabler, Carter and Bonham, JJ. concur.

I, R. E. Wilder, Clerk of the Court of Common Pleas for Sumter County, South Carolina, do hereby certify that the foregoing is a true copy of the decision of the Supreme

Court of South Carolina in this case, the remittitur now being on file in my office.

I do further certify that the said opinion bears date June 26th, 1934 and that a petition for rehearing was seasonably filed with the said Supreme Court which was refused on August 13th, 1934 and the said opinion was filed as a record in my office on August 14th, 1934.

R. E. Wilder, Clerk of the Court of Common Pleas for Sumter County, South Carolina. (Seal Clerk of Court of Com. Pleas, Gen. Sessions, Sumter County, South Carolina.)

[fol. 6] STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. C. SEABURY, as Receiver of the City National Bank of Sumter, S. C., a National Banking Association, Respondent,

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, Beatrice C. Green, as Guardian for Helen Green, Herbert Green and Allen Green, and Helen Green, Herbert Green and Allen Green, Defendants

In re: BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased; Beatrice C. Green as Guardian for Helen Green, Herbert Green and Allen Green, and H. W. Hennig as guardian ad Litem for Helen Green, Herbert Green and Allen Green, Appellants -

Petition for Stay

To the Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

The petition of J. C. Seabury, as Receiver of the City National Bank of Sumter, S. C., a national banking association, respectfully shows:

1. That final judgment of the Supreme Court of South Carolina, in the above entitled cause, was rendered on the 26th day of June, 1934, by an opinion reversing the judgment of the trial Court.

2. That within due course your petitioner, through his attorney, filed a petition for a rehearing in said cause, which petition was refused on the 13th day of August, 1934 and the said opinion of the Supreme Court was immediately forwarded to the Clerk of the Court of Common Pleas for Sumter County, and is now of record in this [fol. 7] Court.

3. That the said final judgment is subject to review by the Supreme Court of the United States on Writ of Certiorari, upon the grounds that the said final judgment denies to your petitioner rights, privileges and immunities granted to him under the constitution and laws of the United States.

4. That your petitioner further presents that the cause of action herein arises solely under the Act of Congress and Acts amendatory thereto commonly known as the National Banking Laws, under which all questions of liability are finally determinable only by the Supreme Court of the United States, which has ultimate jurisdiction of questions of law and fact arising in such case.

5. That your petitioner, being the party aggrieved by the aforesaid judgment of the Supreme Court of South Carolina, desires to apply for a Writ of Certiorari from the Supreme Court of the United States, and in order to make such application and obtain such Writ it is necessary that the execution and enforcement of such judgment be stayed for a reasonable time.

6. That your petitioner further presents that the cause of action, being upon a stock liability of a National Bank, was brought under the direction of the Comptroller of the Currency of the United States, a department of the government of the United States, and that no bond is necessary under Section 28, paragraph 870 U. S. C.; Revised Statutes, paragraph 1101; 36 Statutes, 1131, 1167.

Wherefore your petitioner prays that the execution and enforcement of such judgment, rendered as aforesaid on the 26th day of June, 1934, and now filed in the office of

the Clerk of the Court for Sumter County, South Carolina, a petition for a rehearing of said cause having been refused on the 13th day of August, 1934, be stayed pursuant to the Acts of Congress in such case made and provided, and that your petitioner be allotted a period of ninety (90) days from the date of the refusal of the petition for a rehearing, in which to apply for a Writ of Certiorari from [fol. 8] the Supreme Court of the United States.

Raymon Schwartz, Attorney for J. C. Seabury, as Receiver of the City National Bank of Sumter, S. C.

September 10th, 1934.

[fol. 9] STATE OF SOUTH CAROLINA:

IN THE SUPREME COURT

J. C. SEABURY, as Receiver of the City National Bank of Sumter, S. C., a National Banking Association, Respondent,

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased; Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, Beatrice C. Green, as Guardian for Helen Green, Herbert Green and Allen Green, and Helen Green, Herbert Green and Allen Green, Defendants

In re BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased; Beatrice C. Green as Guardian for Helen Green, Herbert Green and Allen Green, and H. W. Hennig as Guardian ad Litem for Helen Green, Herbert Green and Allen Green, Appellants

Order Staying Execution

The plaintiff herein, J. C. Seabury, as Receiver of the City National Bank of Sumter, South Carolina, having heretofore made application for stay of execution and en-

forcement of judgment in the above entitled cause for a reasonable time in order to enable him to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States,

It is ordered, That the said plaintiff have ninety days from August 13th, 1934, the date of the Order refusing a petition for rehearing, within which to apply for a Writ of Certiorari from the Supreme Court of the United States and that the remittitur and execution and enforcement of said judgment herein be stayed until final disposition of said petition for certiorari and until further order of this Court.

It is further ordered that no bond be required of the plaintiff-receiver in this cause, it appearing to the satis-
[fol. 10] faction of the Court that this suit is brought under the direction of the Comptroller of the Currency of the United States, a department of government, and that no bond is necessary as provided under title 28, paragraph 870 U. S. C.

It is further ordered that a copy of this Order be served upon the defendants in this cause, or one or more of their attorneys of record.

It is further ordered that this Order be filed in the office of the Clerk of the Court of Common Pleas for Sumter County, South Carolina.

Eugene S. Blease, Chief Justice of Supreme Court of South Carolina.

At Chambers, Newberry, S. C., September 12th, 1934.

I certify that the foregoing is a true copy — petition and order for stay, the original being filed in my office, on the 13th day of September, 1934.

R. E. Wilder, Clerk of the Court of Common Pleas for Sumter County, South Carolina. (Seal Clerk of Court Com. Pleas, Gen. Sessions, Sumter County, South Carolina.)

[fol. 11] [Endorsed:] State of South Carolina, County of Sumter. Supreme Court of the United States. J. Congdon Seabury, as Receiver, etc., Petitioner, vs. Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of

Moses Green, deceased, et al., Respondents. Petition for Stay and Order Staying Execution. Raymon Schwartz, Attorney-at-Law, Sumter, S. C.

[fol. 12] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. —

J. CONGDON SEABURY, as Receiver of the City National Bank of Sumter, S. C., a National Banking Association, Petitioner,

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A. of the Estate of Moses Green, Deceased; Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, Beatrice C. Green, as Guardian for Helen Green, Herbert Green and Allen Green, and Helen Green, Herbert Green, and Allen Green, Respondents.

I, R. E. Wilder, Clerk of the Court of Common Pleas and General Sessions for Sumter County, a Court of record, do hereby certify that the following:

1. Complaint.
2. Answer.
3. Decree of the Honorable M. M. Mann, Judge Presiding Third Judicial Circuit.
4. Exceptions of Beatrice C. Green, administratrix D. B. N., C. T. A.
5. Exceptions of Helen Green, Herbert Green and Allen Green, by their guardian ad litem.
6. Transcript of record.

All of the foregoing being included in the case on appeal as filed with the Supreme Court of South Carolina.

7. Opinion and judgment of the Supreme Court of South Carolina made and entered the 26th day of June, 1934.
8. Petition for Writ of Certiorari.
9. Argument in support of petition for Writ of Certiorari.
10. Statement of jurisdiction of the Supreme Court of the United States.
11. Petition and Stay of execution

[fol. 13] is a true copy of the record filed in my office, the judgment of the Supreme Court being dated the 26th day of June, 1934, and petition for rehearing having been seasonably filed and the petition refused, the said judgment was duly filed in my office on the 14th day of August, 1934.

R. E. Wilder, Clerk of the Court of Common Pleas and General Sessions for Sumter County. (Seal Clerk of Court of Com. Pleas, Gen. Sessions, Sumter County, South Carolina.)

[fol. 14] [Endorsed:] State of South Carolina, County of Sumter. Supreme Court of the United States. J. Congdon Seabury, as Receiver, etc., Petitioner, vs. Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased, et al., Respondents. Certificate. Raymon Schwartz, Attorney-at-Law, Sumter, S. C.

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1934.

The petition herein for a writ of certiorari to the Court of Common Pleas for Sumter County, State of South Carolina, is granted, and the case is assigned for argument immediately following No. 214.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,062. South Carolina, Court of Common Pleas for Sumter County. Term No. 434. J. Congdon Seabury, as Receiver of the City National Bank of Sumter, S. C., Petitioner, vs. Beatrice C. Green, Administratrix, D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 1, 1934. File No. 434, O. T., 1934.

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CHARLES ELMORE CRO
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 434

J. CONGDON SEABURY, as Receiver of The City National Bank of Sumter, S. C., a National Banking Association,

Petitioner,

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS FOR SUMTER COUNTY, STATE OF SOUTH CAROLINA.

R. O. Purdy,
Raymon Schwartz,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 434

J. CONGDON SEABURY, AS RECEIVER OF THE CITY NATIONAL BANK OF SUMTER, S. C., A NATIONAL BANKING ASSOCIATION.

Petitioner,

vs.

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF MOSES GREEN, DECEASED; LEON M. GREEN, ALVA I. GREEN, AARON H. GREEN, ETHEL GREEN BLATT, BEATRICE C. GREEN, AS GUARDIAN FOR HELEN GREEN, HERBERT GREEN AND ALLEN GREEN, AND HELEN GREEN, HERBERT GREEN, AND ALLEN GREEN.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, J. Congdon Seabury, as Receiver of The City National Bank of Sumter, S. C., a national banking association, respectfully asks this Court to review on writ

of certiorari a judgment of the Supreme Court of the State of South Carolina in the case of J. C. Seabury (J. Congdon Seabury) as Receiver of The City National Bank of Sumter, S. C., *versus* Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased; Leon M. Green, Alva I. Green, Aaron H. Green, Ethel Green Blatt, Beatrice C. Green, as Guardian for Helen Green, Herbert Green and Allen Green, and Helen Green, Herbert Green and Allen Green, rendered on the 26th day of June, 1934. A petition for rehearing having been seasonably filed, which was refused on the 13th day of August, 1934, the remittitur which included the decision of the Supreme Court of South Carolina was transmitted to the Clerk of the Court of Common Pleas for Sumter County on the 14th day of August, 1934, as shown by a true copy of the record therein, herein filed. Under the practice prevailing on appeal in South Carolina, no final judgment separate from the opinion of the Supreme Court is rendered, and the opinion is the final judgment.

The matters involved and the reasons relied on by the petitioner for the allowance of the writ are:

I.

This action was brought by the petitioner (who is the duly appointed Receiver of The City National Bank of Sumter, S. C., a national banking association, which was declared insolvent by the Comptroller of the Currency of the United States on the 21st day of July, 1932), tried, and decided under Section 5151 of the revised statutes, with amendment of December 27th, 1913, C. 6, paragraph 23, 38 Stat. 273 and Section 5152 of the revised statutes, to recover for the statutory liability upon four shares of capital stock issued by the City National Bank to Moses Green,

who died March 17th, 1927, leaving of force his last Will and Testament.

Under the terms of his said Will, the four shares in question were transferred to his grandchildren, Helen Green, Herbert Green and Allen Green, who at the time of his death and still are, infants.

The case was submitted to the presiding Judge of the Court of Common Pleas for Sumter County upon an agreed Statement of Facts as follows:

1. It is agreed that this case should be tried before Judge Mann at Sumter without a jury.

2. It is further agreed that the late Moses Green, a citizen of Sumter County, South Carolina, departed this life on or about the 17th day of March, 1927, leaving of force his last will and testament, which was duly filed for probate in the office of the Judge of Probate for Sumter County, whereunder Leon M. Green, the named executor, duly qualified and entered upon the discharge of his duties.

3. That Beatrice C. Green, was, on or about April 15th, 1933, duly appointed and qualified as administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, and is now engaged upon the discharge of her duties as such.

4. That the heirs and distributees at law of the estate of Moses Green, deceased, are Leon M. Green, A. I. Green, A. H. Green, E. G. Blatt, and Helen, Herbert and Allen Green, the last three being infant children of a predeceased son of the said Moses Green, to-wit, Harry Green, And that Beatrice C. Green is the duly appointed and qualified general guardian of the said three infant children named.

5. That the City National Bank of Sumter, a national banking association, had a capital stock of $150,000.00, divided into 1,500 shares of $100.00 each, and that the said

Bank became insolvent on or about the 21st day of July, 1932, and its affairs were placed in the hands of J. C. Seabury, the duly appointed and qualified Receiver of the said bank.

6. That there was an insufficiency of assets to pay the creditors of said insolvent bank, and an assessment of $100.00 per share on the capital stock was ordered by the Comptroller on August 26, 1932, and the Receiver gave due notice thereof and demanded payment of the stockholders, which said payment was to be made on or before October 3, 1932. That after the appointment of Beatrice C. Green, as administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, that demand was made upon the said administratrix for the payment of the stock assessment upon four shares of stock standing in the names of Helen, Herbert and Allen Green, infant defendants herein. That the said administratrix has failed and refused to pay the same.

7. That L. M. Green, A. I. Green and A. H. Green are non-residents of the State of South Carolina. Certain real estate of theirs, respectively, has been attached in this proceeding.

8. That included among the assets of the estate of the late Moses Green, deceased, were a number of shares of bank stock in the said City National Bank of Sumter, S. C., which said stock constituted part of the residuary estate of the testator, and was distributed by the executor under the terms of the residuary clause of the will, four shares of said stock being transferred to the three infants named herein, the same appearing on the books of the said bank while it was a going concern. That at the same time there was transferred on the books of the bank to the adult

heirs named herein their pro rata number of said shares of stock under the provisions of the will.

9. That the executor has been duly discharged, and at the time of the said transfer of stock the said bank was a going concern, and no demand was made upon the executor for the payment of any bank stock liability.

10. That the adult heirs of the said Moses Green, deceased, have paid their respective stockholders liability upon the shares of stock standing in their names respectively, arising by reason of the insolvency of the said City National Bank of Sumter. And although due demand has been made, neither the infant defendants, the administratrix D. B. N., C. T. A., nor the adult heirs have paid the stockholders liability referred to in the Complaint, and the said assessment still remains open and unpaid.

11. That there remains in Sumter County real estate undivided, in which all of the heirs have an interest, of a value far in excess of the total amount of bank stock divided among the heirs, and the value of the infants' interest in said real estate far exceeds the face amount of the bank stock appearing in their names on the books of the bank.

12. That this suit is brought by the plaintiff, as the duly appointed Receiver of the City National Bank of Sumter, S. C., after a stock assessment was levied by the Comptroller of the Currency of the United States, the said suit being brought under the direction of the Comptroller of the Currency of the United States and pursuant to and under the national banking laws of the United States to enforce the liability upon the said four shares of stock.

The presiding judge, who heard this cause, filed his Decree, giving judgment in favor of your petitioner against

Beatrice C. Green, as administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, in the sum of four hundred ($400.00) dollars, with interest thereon from October 3, 1932, the date upon which the assessment upon said bank stock was payable, and subjected the real and personal property of the respondents, who were devisees and legatees under the will of Moses Green, deceased, to the payment of the said stock assessment in the event that the same was not collectible from said estate.

Thereafter, and within due course, the said administratrix D. B. N., C. T. A., the infant defendants and their duly appointed guardian *ad litem* appealed from this judgment to the Supreme Court of South Carolina.

The adult defendants, to-wit, Leon M. Green, Alva I. Green, Aaron H. Green and Ethel Green Blatt, although the judgment of the lower court subjected the property, which they owned and held as devisees and legatees of Moses Green, deceased, to the payment of the stock assessment, did not appeal.

The decision of the Supreme Court of South Carolina reversed the judgment of the lower court and relieved the adult defendants also from the operation of the said judgment although they did not appeal from the judgment below.

II.

Your petitioner earnestly contends that writ of certiorari should be granted by this Court to review and reverse the judgment of the State Supreme Court herein because:

The decision of the Supreme Court of South Carolina nullifies the operation of the Federal statute under which this suit was brought and in substance holds that no liability, upon the four shares of stock, rests upon the estate of Moses Green, deceased, nor does it subject the real and

personal property owned and held by the devisees and legatees of Moses Green, deceased, to payment of the said stock assessment, which is contrary to the decisions of this Court.

Aldrich v. *Bingham,* 131 Fed. 363;
Early v. *Richardson,* 280 U. S. 496;
Richmond v. *Irons,* 121 U. S. 27;
Mattison v. *Dent,* 176 U. S. 521;
Luce v. *Thompson,* 36 F. (2d) 183.

III.

The judgment of the Court of Common Pleas, in favor of your petitioner against the adult respondents herein in this cause, in so far as the property which they held as devisees and legatees of Moses Green, deceased, not having been appealed from, vested in your petitioner a property right. And the Supreme Court in granting to these adult respondents relief from the provisions of the decree of the lower court, from which they did not appeal, deprives your petitioner of his property without due process of law in contravention of the Fifth Amendment of the Federal Constitution, a judgment not appealed from being a vested property right.

Hoyt Metal Co. v. *Atwood,* 289 Fed. 454;
Merchants Bank v. *Ballou* (Va.), 32 S. E. 481;
Louisiana v. *New Orleans,* 215 U. S. 177.

WHEREFORE, for the foregoing reasons, because the said decision and judgment of the said Supreme Court decided the foregoing Federal questions in a way not in accord with the applicable decisions of this Court, your petitioner prays that a writ of certiorari be issued to the Court of Common Pleas for Sumter County where the remittitur of the Supreme Court of South Carolina is now filed (*Salamon* v. *State Tax Commission,* 278 U. S. 484, 73 L. Ed. 464), to the

end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review that the said judgment of the Supreme Court of South Carolina be ordered reversed.

J. CONGDON SEABURY,
As Receiver of The
City National Bank of Sumter, S. C.

Sumter, S. C., September 24th, 1934.

R. O. PURDY,
Sumter, S. C.,
RAYMON SCHWARTZ,
Sumter, S. C.,
Attorneys for J. Congdon Seabury, as Receiver of The City National Bank of Sumter, S. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 434

J. CONGDON SEABURY, AS RECEIVER OF THE CITY NATIONAL BANK OF SUMTER, S. C., A NATIONAL BANKING ASSOCIATION,

Petitioner,

vs.

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF MOSES GREEN, DECEASED; LEON M. GREEN, ALVA I. GREEN, AARON H. GREEN, ETHEL GREEN BLATT; BEATRICE C. GREEN, AS GUARDIAN FOR HELEN GREEN, HERBERT GREEN AND ALLEN GREEN; AND HELEN GREEN, HERBERT GREEN, AND ALLEN GREEN.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported, but a certified copy thereof is attached herewith.

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein was June 26, 1934, but a petition for rehearing having been seasonably filed, the same was not disposed of until August 13, 1934, when the Supreme Court of South Carolina refused the petition and on that day the clerk of that court sent down the remittitur to the clerk of the Court of Common Pleas for Sumter County, as shown by a letter of J. B. Westbrook, clerk of the Supreme Court, dated August 13, 1934, as follows: "I beg to advise that the petition for a rehearing, in Seabury against Green, has been dismissed by the Court and the remittitur is being sent down to-day."

This suit was brought, tried and decided under an Act dated June 3, 1864, c. 106, paragraph 12, 13 Stat. 102, as amended December 23, 1913, c. 6, paragraph 23, 38 Stat. 273, providing in part as follows:

> "Individual liability of shareholders; transfer of shares. The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagement of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

Judgment was rendered for petitioner herein, in the sum of four hundred ($400.00) dollars, with interest thereon from October 3, 1932, at the rate of seven per cent per annum. The administratrix D. B. N., C. T. A., and the infant defendants appealed to the Supreme Court of South Carolina. The judgment of the trial court was reversed as to the defendants who appealed, as well as those who did not appeal.

The jurisdiction of this Court is invoked under section U. S. C., Title 28, paragraph 344 (Jud. Code, paragraph

237), Par. (b). "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied," and under Article 3, section 2 of the Constitution of the United States.

The cases believed to sustain the jurisdiction of this Court are as follows:

Schofield v. *Palmer* (C. C. Va.), 134 Fed. 753;
In re Chetwood, 165 U. S. 443;
Auten v. *U. S. Nat. Bank*, 178 U. S. 125.

Statement of Case.

All of the relevant facts are fully set out in the petition, including the Agreed Statement of Facts upon which this case was tried, and will be stated in the body of this brief only in so far as will be necessary in the discussion of the questions involved.

ARGUMENT.

I.

The estate of a testator is liable for the stock owned by the testator at the time of his death until the same is transferred to another legally capable of assuming liability on the same.

It is well settled that infants are not capable of assuming stock liability upon National Bank stock.

Early v. *Richardson,* 280 U. S. 496.

Where one causes stock to be transferred to an infant, such person becomes liable for the assessment when levied by the Comptroller.

Early v. *Richardson,* 280 U. S. 496;
Aldrich v. *Bingham,* 131 Fed. 363;
Foster v. *Wilson,* 75 Fed. 797;
Riley v. *Bondi,* 64 F. (2d) 516.

The fact that the stock was transferred pursuant to Item 9 of the will of the testator, wherein he provided that the residue of his estate, real and personal, should be divided at the time of his death as follows: "one-fifth *thereof* to the children of my deceased son, Harry, namely Helen, Herbert and Allen," does not relieve his estate from liability thereon. The liability rests upon the estate the same as though he had transferred the same to his grandchildren during his lifetime.

In the opinion, filed by the Supreme Court, the court says, "as this transfer was not the act of the testator, then the estate of the testator is not liable therefor."

The executor is merely the legal representative of the deceased, and in distributing the stock under the ninth paragraph of the will, the executor was acting as the dispenser

of the goods of the dead, the gift being that of the testator to his infant grandchildren.

Mattison v. *Dent*, 176 U. S. 521.

The case of *Davis* v. *Weed*, 44 Conn. 569, 7 Fed. Cas. 3658, is authority for the principle that a Receiver of a National Bank has a valid claim for an assessment against the estate generally, against the deceased stockholder who died prior to the insolvency of the bank, but whose stock has not been transferred. It is true that the stock, which is the subject of this litigation, was transferred pursuant to the will of the testator to minors, incapable of assuming the liability. It necessarily follows that if the stock was transferred to one incapable of assuming the statutory liability on the same the legal status of the stock is the same as though it had never been transferred from the estate of the testator and therefore the estate is liable therefor; for as was held in the case of *Mattison* v. *Dent*, *supra*, contract liability still adheres to the estate until the same has been discharged by some act which shows that the new stockholder has taken the place of the old one.

Since no liability upon the bank stock could be placed upon the infants, no new stockholder has taken the place of the old one and the estate of the testator must be liable therefor.

II.

The property of the testator owned by his devisees and legatees is made subject to the payment of the stock assessment unless the stock was transferred to one legally capable of owning the same.

Since the estate of the testator has been distributed and the devisees and legatees, under his will own and hold his estate as such, such estate is properly subject to the payment of the liability in this action.

The heir is liable to the ancestor's creditors for value of personalty as well as real estate received, if ancestor's estate was settled and closed before claim accrued and the receiver of a National Bank is entitled to follow assets of deceased stockholder in the hands of beneficiary under the will to collect the assessment ordered by the Comptroller of Currency after the estate was closed and its entire assets distributed.

Luce v. *Thompson,* 36 F. (2d) 183.

A shareholder's liability (upon bank stock) continues after his death until there is a transfer of his stock upon the books of the bank * * * and notwithstanding the stockholder died and his estate was distributed and settled prior to the insolvency of the bank, the estate is still liable in the absence of such transfer of stock, *to one legally capable of holding the same* (italics added) and the estate may be followed in the hands of the distributees and legatees * * * and the whole amount of the assessment enforced to the extent of the distributive share received regardless of when the liability arose, so long as there is no transfer to one legally capable of assuming the same.

Mattison v. *Dent,* 176 U. S. 521.

The opinion of the Supreme Court is premised upon the decision of *Williams* v. *Cobb,* 242 U. S. 307, which is distinguished from the case herewith submitted, upon the ground that in that case the trustees, under the Wisconsin statute, were legally capable of holding the stock, and therefore did and could assume the liability thereon; whereas in the case now being submitted, under the authorities above cited, the infants were incapable of assuming the liability upon National Bank stock.

III.

Judgment having been given for plaintiff, subjecting the property of certain adult defendants to the payment of the liability, became a vested property right of the judgment creditor, which could not be divested unless the aggrieved party seasonably appealed from the judgment.

The Fifth Amendment to the Federal Constitution provides in part that no person shall "be deprived of life, liberty or property without due process of law."

The petitioner, herein, having brought suit against the administratrix d. b. n., c. t. a., of the estate of the testator and against all of the devisees and legatees, and judgment having been given, first, against the estate for four hundred ($400.00) dollars and interest, and, second, against the devisees and legatees of the testator in so far as it subjected their property as such to the payment of the liability and no appeal having been seasonably filed by certain adult heirs, to-wit, Leon M. Green, Alva I. Green, Aaron H. Green and Ethel Green Blatt, the judgment in favor of the petitioner, herein, against the adult devisees and legatees, in so far as it subjected their property to the payment of the liability, became a vested property right in the petitioner herein.

The opinion of the State Supreme Court specifically sets forth that the adults did not appeal in these words, "The decree of the Circuit Judge was in favor of the plaintiff and from the judgment, as rendered, the defendants, Beatrice C. Green, as administratrix and as guardian for the three minor defendants, and H. W. Hennig, as guardian *ad litem* for said minor defendants, have prosecuted this appeal. *The other defendants did not appeal.*"

In re Coleman, 106 S. C. at page 541, Supreme Court of South Carolina uses the following language, "no one ap-

pealed from this decree except the appellants named herein. That being the case, all are precluded from raising any question as to the correctness of Judge Smith's decree, excepting the appellants."

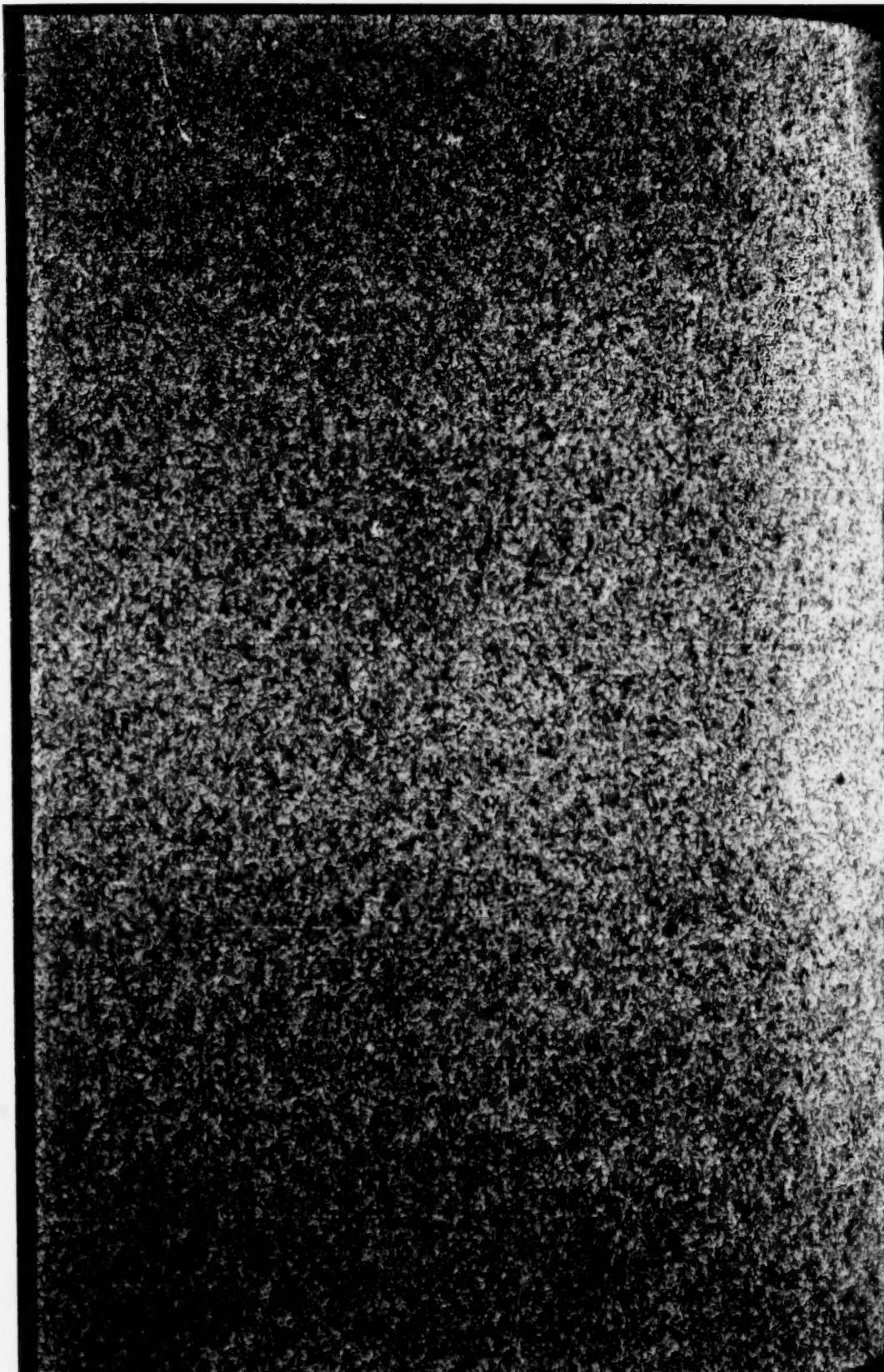
It is respectfully submitted that inasmuch as the adult defendants did not appeal and the Supreme Court of South Carolina having, by its decision, granted them relief for which they never asked, that such decision violates the Fifth Amendment to the Federal Constitution in that it deprives the petitioner herein of his vested property right, to-wit, a judgment against the adult heirs from which no appeal was taken, without due process of law; for a judgment is a vested property right;

Bank v. *Ballou* (Va.), 32 S. E. 481;
Louisiana v. *New Orleans*, 215 U. S. 177.

Respectfully submitted.

R. O. PURDY,
RAYMON SCHWARTZ,
Attorneys for Petitioner J. C. (Congdon) Seabury, as Receiver of the City National Bank of Sumter, S. C.

Sumter, S. C., September 24, 1934.



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DEC 8 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 434.

J. CONGDON SEABURY, As Receiver of the City National Bank of Sumter, South Carolina, *Petitioner,*

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al., *Respondents.*

BRIEF OF PETITIONER.

GEORGE P. BARSE,
RAYMON SCHWARTZ,
Attorneys for Petitioner.

F. G. AWALT,
J. H. BREWER, JR.,
Attorneys for Comptroller of Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees	16

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(A) The decision of the State Supreme Court that the attempted transfer of the four shares of stock to the minors was void, and ineffectual to transfer title, necessarily requires the conclusion, in consequence thereof, that title to such stock never passed from Moses Green and that his estate remained responsible for such liability as the law attached thereto incident to such ownership.. 16

(B) The contingent assessment liability of Moses Green upon the four shares of stock survived his death, became a liability and charge or lien upon his estate, became an absolute liability upon the levy of the assessment, and can be enforced by the receiver against the assets in the hands of the distributees and legatees (including the assets received by the minor defendants), notwithstanding the assets had been distributed and the estate closed a considerable period prior to the levy of the assessment 19

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(C) The laws of South Carolina make the debts and obligations of a decedent a charge or lien upon the assets of his estate, and in consequence permit the creditor to pursue the assets into the hands of the heirs, distributees and legatees 21

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(D) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of the distributees and legatees, and accordingly the court below was in error in holding that the assets of the estate of Moses Green were not traceable to the defendants as distributees and legatees of said estate 26

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C., for the amount of the assessment to the extent of the assets received from the estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention 30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 434.

J. CONGDON SEABURY, As Receiver of the City National Bank of Sumter, South Carolina, *Petitioner,*

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al., *Respondents.*

BRIEF OF PETITIONER.

A.

OPINIONS BELOW.

The decision and opinion of the Supreme Court of South Carolina is reported in 175 S. E. 639, and appears in the record, pages 25-31. The decision and opinion of the Court of Common Pleas of Sumter County, South Carolina, is not reported, but appears in the record, pages 12-21.

B.

JURISDICTION.

The decision of the Supreme Court of South Carolina was filed of record June 26, 1934 (R. p. 25). Petition for rehearing was seasonably filed under the State practice, and was denied August 13, 1934 (R. p. 32). Petition for writ of certiorari was in due course filed, and an order by this Court granting the writ was filed November 5, 1934 (R. p. 39).

The writ of certiorari was applied for under section 237(b) of the Judicial Code (U. S. Code, Title 28, ch. 9, sec. 344(b)), providing for the granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a state in a suit:

> "where any *title, right, privilege,* or immunity, is specially set up or claimed by either party under the Constitution, or any treaty or *statute of* * * * the United States; and the power to review under this paragraph may be exercised as well where the said claim is sustained as where it is denied * * *." (Italics inserted)

Discussion of the question of jurisdiction, under the statute, will be found under the caption "The Federal Question" immediately following the "Statement of the Case", *infra,* page 6.

C.

STATEMENT OF THE CASE.

Petitioner, as receiver of the City National Bank of Sumter, South Carolina, filed a suit May 18, 1933, in the Court of Common Pleas of Sumter County, South Carolina, against the defendants hereinafter named, to enforce the collection of a stock assessment, levied by the Comptroller of the Currency, upon four shares of stock of said bank of the aggregate par value of $400, which were registered

upon the books of the bank in the name of one Moses Green at the time of his death March 17, 1927 (R. pp. 2-6). Moses Green left a will making certain specific bequests and devises and providing in the residuary clause thereof that the balance of his estate, real, personal, or mixed, be equally divided into five parts, one-fifth to his grandchildren, defendants Helen, Herbert and Allen Green, and one-fifth to each of his four surviving children, defendants Leon M. Green, Alvah I. Green, Ethel Green Blatt, and Aaron Green. Leon M. Green was appointed executor. (R. pp. 9-11)

Due administration was had upon said estate, the assets were distributed, the estate was closed, and the executor, Leon M. Green, was discharged. At the time of such discharge the bank was a going concern, no assessment had been levied, and no demand had been made upon said executor for the payment of any stock assessment liability (R. pp. 5, 15). The exact date of closing of the estate is not shown, but it appears to have been several years prior to the closing of the bank. (R. p. 5)

Included among the assets so distributed were twenty shares of stock of said bank. Each of the four adult defendants received four shares of said stock, and the same were transferred upon the books in their names, and said defendants have paid their assessments upon said stock (R. pp. 16, 20). The remaining four shares were transferred by the executor to, and registered upon the books of the bank in the names of said grandchildren, defendants Helen, Herbert, and Allen Green, who were at that time, and at the time of the filing of said suit, minors (R. pp. 14, 15).

Said City National Bank closed on or about July 21, 1932, petitioner was duly appointed receiver of said bank (R. pp. 2, 15), and an assessment was levied by the Comptroller upon all of the shareholders (R. pp. 3, 15). Demand upon all of the shareholders of said bank for the payment of said assessment was made by the receiver, including the demand upon the adult defendants herein, and upon defendant Beatrice C. Green as guardian of said minor defendants. Said

Beatrice C. Green (apparently in order to be qualified to defend a suit against the estate of Moses Green for the assessment upon the four shares of stock standing in the names of said minors) was duly qualified as Administratrix D. B. N., C. T. A., of the estate of said Moses Green, in accordance with the practice prevailing in South Carolina (R. pp. 3, 15), and thereupon demand was made by said receiver upon said Beatrice Green as administratrix of the estate of said Moses Green for payment of the assessment liability upon the four shares of stock standing in the names of said minors, Helen, Herbert, and Allen Green, and said administratrix refused to pay the same (R. p. 15).

The assets having been distributed to the defendants (including the minors) the Receiver prayed *judgment only*, as against the administratrix D. B. N. C. T. A., but prayed also that the assets held by the defendants (including the minors) be held subject to the assessment liability. (R. p. 4)

Answer was filed by Beatrice C. Green in her capacity as Administratrix D. B. N., C. T. A., and also as guardian for the minor defendants, wherein liability of the estate of Moses Green for said assessment was denied, and wherein also it was alleged that the attempted transfer by the executor, Leon M. Green, of the said four shares of stock to said minors, was without lawful authority, and that said infants were incapable of accepting the same, and that said transfer was not binding upon said infants. (R. pp. 5, 6) An answer on behalf of said infant defendants was also filed by one H. W. Hennig as guardian ad litem, wherein he adopted by reference the aforesaid answer of said Beatrice C. Green as administratrix and as guardian and submitted the interests of the minors to the protection of the court in accordance with the customary procedure. (R. p. 6) Answer was also filed by the four adult defendants denying assessment liability upon the four shares of stock standing in the name of the infants, and denying that the estate of Moses Green was liable for assessment upon said four

shares of stock, and also setting forth as a further defense that if they should be found to be liable for the payment of said assessment they were entitled to have the lands and property acquired by the minor defendants from the estate of Moses Green applied toward the payment of said assessment upon said four shares of stock (R. p. 7).

The Court of Common Pleas decided, inter alia: (1) that the attempted transfer of the four shares of stock to the minor defendants was void and ineffectual (R. pp. 17, 18); (2) that the four shares of stock should stand as though never transferred from the estate of Moses Green and that said estate, through said Beatrice C. Green as Administratrix D. B. N., C. T. A., must be considered the owner of said stock (R. p. 18); (3) that the assets of the estate of Moses Green received by all of the defendant distributees and legatees must stand subject to the payment of the assessment upon said four shares (R. p. 19); (4) that the assets of the estate acquired by the infant defendants should first be applied toward the payment of said assessment before recourse should be had to the assets acquired by the adult defendants (R. p. 20).

Appeal to the Supreme Court of the state of South Carolina was taken by all of the defendants *except the adult defendants.* (R. pp. 25, 27) The state Supreme Court (1) denied liability of the estate of Moses Green for the assessment (R. pp. 29, 30); (2) denied that the assets acquired from the estate by the defendants were subject to the payment of the assessment liability (R. p. 30); (3) reversed the judgment of the trial court in toto, *both as to the adult defendants who had not appealed,* as well as to the minor defendants and their representatives (R. p. 31). Additional facts are set forth in agreed statements of facts (R. pp. 8, 14-16).

D.

THE FEDERAL QUESTIONS.

Petitioner submits that the following Federal questions are shown by the Record:

(a) Determination of the issue of whether the estate of Moses Green retained ownership of the four shares of stock transferred to and registered in the names of the minor defendants (and not transferred to their guardian or to a trustee for their benefit) is clearly a Federal question involving the construction of the assessment statutes (Secs. 64 and 66, ch. 2, Title 12, U. S. Code) with reference to the well settled judicially determined legislative intent that there shall at all times be holders of stock in a national bank legally competent to acquire and hold the same and assume the liability incident thereto and that transfers of such stock to minors, or persons under other disabilities rendering them personally incapable of accepting title and liability, shall be ineffectual and inoperative and that such transferors shall remain the owners, at least so far as assessment liability is concerned. Concerning such legislative intent, see:

Early v. Richardson, 280 U. S. 496, 499;
Riley v. Bondi, 64 F. (2) 515, 517;
Aldrich v. Bingham, 131 Fed. 363;
Foster v. Wilson, 75 Fed. 797.

The trial court held (R. pp. 18, 19) that inasmuch as the transfer to the minor defendants was void and ineffectual, title to the stock remained in the estate, and that the estate was liable. The State Supreme Court, in substance, reversed the trial court in this respect and held that as the transfer of the stock to the minors was not the act of the testator and as the executor could not make a separate and independent contract binding the estate of the testator, the estate of the testator was not liable upon the assessment liability. Hence, the right claimed by the receiver under

the Federal statute (and the well settled construction and interpretation of such statute) to treat the estate of the testator as the owner of the stock and to hold such estate liable to the extent permitted by law was directly passed upon, as a matter of substance by the State Supreme Court and such right to recover under the Federal statute was denied.

(b) The State Supreme Court assigned as further reasons for its denial of the liability of the estate of Moses Green upon the stock assessment, (1) that no such claim "*existed*" against the estate during the orderly administration of the estate, and (2) that under the State statutes the claim could not be enforced against the assets of the estate due to the fact that the assets had been distributed and the estate closed years before the liability was sought to be enforced against the estate. (R. p. 30)

With reference to the first point, *i. e.*, whether the claim existed, it is submitted that the determination of such issues certainly requires the construction of the Federal assessment statutes so as to determine the *nature* of the assessment liability thereunder and whether it is of such character as to *exist* or constitute a claim against the estate during the period of administration of the estate in view of the fact that the bank was not then closed and the assessment had not been levied.

With reference to the second point, *i. e.*, the enforcement of the assessment claim notwithstanding the distribution of the assets, it is submitted that a substantial construction of the Federal statutes is required in order to determine whether the *nature* of the charge or lien arising from or based upon the contingent assessment liability is such as to follow the assets of the estate to the distributees and legatees even though distribution has been made before the assessment has been levied and to determine further in that connection whether State statutes or decisions concerning estates of decedents affect the lien created by the Federal assessment statutes so as to prevent said lien from following the assets.

In this connection petitioner will endeavor to show: that the decisions of this Court, and of other Federal courts, have construed said Federal assessment statutes in analogous cases and have held that said Federal assessment statutes do create a debt or obligation which *exists* as a charge or lien against the estate of a decedent notwithstanding the assessment may not have been levied at the time of administration of the estate; that said charge or lien, having been created by Federal statutes, follows the assets of the decedent upon which it is impressed and permits the assessment claim, by virtue of said lien, to be collected from said assets even though they may have been distributed to the heirs, distributees or legatees, and that said assets may be so followed regardless of the provisions of State laws and decisions contrary thereto.

In view of the foregoing it seems clear that the issues thus present under this subdivision of the discussion raised Federal questions substantial in nature, and that the determination of them involves a Federal question which is vital to the uniform enforcement of the assessment statutes.

It may be observed in this connection that the State Supreme Court, recognizing the problem presented, determined that the act of Congress was not sufficiently broad in scope to meet the situation and in that connection said:

> "It does not seem that either the act of Congress or the State statute imposing liability on stockholders in banks is sufficient to cover the very peculiar facts existing in this case." (R. p. 30)

It is obvious from this statement of the court that the court did construe the Federal statute and, in its opinion, found it wanting and consequently denied the right claimed by the receiver.

(c) It is well settled that a receiver of a national bank is an officer of the United States, and that he is acting as an officer of the United States when he is proceeding with the performance of his duties under the supervision and

direction of the Comptroller of the Currency, who is also an officer of the United States. In the instant case the receiver, as such officer, and incident to his duties in winding up the affairs of an insolvent national bank, filed suit to recover on behalf of the depositors and creditors of the bank, as an asset accruing for their benefit, an assessment that was levied, not by virtue of state law, but by virtue of the Federal statutes which (1) created the assessment liability, and (2) made that assessment liability a lien upon the assets of the estates of decedents. The denial of the right of recovery is a denial of rights sought to be enforced by a Federal officer under a Federal statute, and hence, in its essence, involves a Federal question.

In this connection may be noted the case of Rector, Trustee, v. City Deposit Bank, 200 U. S. 405, 411, 412, which was a suit instituted by a trustee in bankruptcy to recover from the City Deposit Bank the sum of $1300 which the trustee contended was a voidable preference over the other creditors. The trial court, and the Supreme Court of Ohio, each denied recovery. On appeal to the Supreme Court of the United States, the bank contended that no Federal question was involved, and made a motion to dismiss on that ground. In response to that contention this court said:

> "Both these contentions might well be disposed of by saying that *the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.*" (p. 411, Italics inserted)
>
> * * * * * * * * *
>
> "Applying this principle, we think *as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States,* the certificate makes clear the fact, if it were otherwise doubtful, that rights under the

bankrupt law were relied upon and passed upon below. *And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of section 709 of the Revised Statutes. Nutt v. Knut,* 200 U. S. 12." (p. 412, Italics inserted)

Also see:

Yates v. Jones National Bank, 206 U. S. 158, 165, 167, 172, 175, 176, 177, 178, 180.
Logan County National Bank v. Townsend, 139 U. S. 67.
First National Bank of Grand Forks v. Anderson, 172 U. S. 573.
McCormick v. Market Nat. Bank, 165 U. S. 538.
Rankin v. Barton, 199 U. S. 228.

In Matteson v. Dent, 176 U. S. 521, recovery was sought by the receiver upon the stock assessment liability under circumstances quite analogous to the instant case so far as the basic principles are concerned. There seemed to be some disposition on the part of this court at that time (Opinion, p. 530) to hold that no substantial Federal question was involved, apparently on the theory that liability was being enforced against the distributees and legatees of the estate of the decedent to the extent of the assets received by them, in reliance upon the Minnesota law, and that consequently the real question involved concerned the effect of the state law taken in conjunction with the Federal law. It is here suggested that in view of the reasoning indicated in the later case (above cited and quoted) of Rector, Trustee v. City Deposit Bank, *supra,* and in other cases of like import, this court would probably now take the view, so far as the jurisdictional question in that respect is concerned, that the position tentatively taken in Matteson v. Dent was too narrow an interpretation of the jurisdictional limitations. At any rate, the instant case is distinguishable from Matteson v. Dent in the following respects:

(1) No question of ownership and title of the national bank stock was involved in Matteson v. Dent, for the reason that the same had remained of record in the name of the testator up to the time of the bringing of suit, whereas, in the instant case, the question of title and ownership of the four shares of stock attempted to be transferred to the minors, and whether that ownership remained in the estate, and thus rendered the estate liable for the assessment, is in issue.

(2) In the instant case the right to follow the assets will be predicated upon the lien created by the Federal assessment statute, regardless of the statutes or decisions of the state of South Carolina, whereas in Matteson v. Dent the pursuit of the assets was based upon the state statute.

Further in this connection it may be noted that section 24 of the Judicial Code (U. S. Code, Title 28, ch. 2, Sec. 41(16)) gives the Federal courts jurisdiction in cases involving the winding up of the affairs of insolvent national banks, regardless of diversity of citizenship, the amount involved, etc. From this it would seem to be a fair inference that Congress considered that questions arising in connection with the liquidation of the affairs of national banks involved the application and enforcement of the laws of the United States and the rights and privileges thereunder claimed, and hence that such matters should appropriately be brought within the jurisdiction of the Federal courts. The receiver could have brought this suit in the first instance in the Federal court, and in the event the suit had been determined adversely to him by the Circuit Court of Appeals, he could have applied for a writ of certiorari under sec. 240(a) of the judicial code (U. S. Code, Title 28, ch. 9, sec. 347(a)) without having to establish as a basis for staying in this court that a Federal question was involved. It seems reasonable to assert that such right to apply for certiorari was conferred in implied recognition of the fact that a Federal question would necessarily be involved in such litigation in which the receiver as an officer of the

United States was a party and was claiming a right under a Federal statute as an incident to the winding up of the affairs of a national bank. Does the fact that he is now seeking to review the judgment of a state court rather than the judgment of the Federal Circuit Court of Appeals, change the essential nature of the questions involved? We believe not.

(d) The state Supreme Court reversed the judgment of the trial court in toto and set aside the judgment in favor of the receiver not only as against the minor defendants but also as against the adult defendants. However, the adult defendants did not appeal from the judgment of the trial court. A judgment is clearly property. See Hoyt Metal Co. v. Atwood, 289 Fed. 453, 454, 455; Merchants Bank of Danville v. Ballou, 32 S. E. 481, 483; 98 Va. 112. The adult defendants not having appealed, and thus not being before the court, it would seem to follow that the setting aside of the judgment under such circumstances would constitute a deprivation of property "without due process of law" contrary to the 14th amendment to the Federal Constitution. It is submitted that this also raises a Federal question for determination by this court. While it is true that this aspect of the case was not passed upon by the State Supreme Court, it could not very well have been an issue before said court, inasmuch as it could not develop until the judgment had been rendered. The procedure from such a judgment permits application for writ of certiorari to review the same and it was not necessary, as indicated on page 6 of respondents memorandum filed in opposition to the granting of a writ of certiorari, that petitioner, in filing petition for rehearing before the state Supreme Court set up this ground as a prerequisite to avail himself of the right given by statute to apply for certiorari. As a matter of fact, however, although it is not shown by the printed record, we now find that this point was discussed in the petition for rehearing, and we attach hereto as an appendix, what we understand to be a correct copy,

although uncertified, of the petition for rehearing. This is inserted for such reference as the Court may see fit to make to the same in this connection.

E.

SPECIFICATION OF ERRORS.

(1) The State Supreme Court erred in holding that the estate of Moses Green did not remain liable when the attempted transfer of the four shares of stock to the minors by the executor was found to be void and ineffectual to pass title to said minors;

(2) The State Supreme Court erred in holding that no claim upon the assessment liability "*existed*" against the estate of Moses Green during the course of administration of the estate;

(3) The State Supreme Court erred in holding that the claim upon the assessment liability, not having been presented during the course of administration of the estate, could not be lodged against the estate after the distribution of assets and closing of the estate;

(4) The State Supreme Court erred in holding that the assessment claim could not be enforced and collected by pursuit of the assets of the estate into the hands of defendants as distributees and legatees of the estate;

(5) The State Supreme Court erred in holding that the judgment of the Court of Common Pleas should be reversed in toto, not only as against the defendant who did appeal, but also as against the adult defendants who did not appeal;

(6) In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the

assets of the guardianship estate of said minors were liable under Sec. 66, Ch. 2, Title 12, U. S. C. for the amount of the assessment to the extent of the assets received from the estate of Moses Green.

F.

SUMMARY OF ARGUMENT.

I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees.

(a) The decision of the State Supreme Court that the attempted transfer of the four shares of stock to the minors was void, and ineffectual to transfer title, necessarily requires the conclusion, in consequence thereof, that title to such stock never passed from Moses Green and that his estate remained responsible for such liability as the law attached thereto incident to such ownership.

(b) The contingent assessment liability of Moses Green upon the four shares of stock survived his death, became a

liability and charge or lien upon his estate, became an absolute liability upon the levy of the assessment, and can be enforced by the receiver against the assets in the hands of the distributees and legatees (including the assets received by the minor defendants), notwithstanding the assets had been distributed and the estate closed a considerable period prior to the levy of the assessment.

(c) The laws of South Carolina make the debts and obligations of a decedent a charge or lien upon the assets of his estate, and in consequence permit the creditor to pursue the assets into the hands of the heirs, distributees and legatees.

(d) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of the distributees and legatees, and accordingly the court below was in error in holding that the assets of the estate of Moses Green were not traceable to the defendants as distributees and legatees of said estate.

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the, State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C. for the amount of the assessment to the extent of the assets received from the estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention.

III. The State Supreme Court was in error in reversing the judgment of the Court of Common Pleas in so far as the same affected the adult defendants, for the reason that said adult defendants did not appeal from the judgment of the Court of Common Pleas.

G.

ARGUMENT.

I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees.

(A) THE DECISION OF THE STATE SUPREME COURT THAT THE ATTEMPTED TRANSFER OF THE FOUR SHARES OF STOCK TO THE MINORS WAS VOID, AND INEFFECTUAL TO TRANSFER TITLE, NECESSARILY REQUIRES THE CONCLUSION, IN CONSEQUENCE THEREOF, THAT TITLE TO SUCH STOCK NEVER PASSED FROM MOSES GREEN AND THAT HIS ESTATE REMAINED RESPONSIBLE FOR SUCH LIABILITY AS THE LAW ATTACHED THERETO INCIDENT TO SUCH OWNERSHIP.

The fifth paragraph of the answer of Beatrice C. Green, as administratrix D. B. N., C. T. A., and also as guardian of the minor defendants, asserted that the attempted transfer of the four shares of stock to the minors was illegal and void (R. pp. 5, 6). The Court of Common Pleas sus-

tained this contention (R. pp. 17, 18). The decision of the state Supreme Court also held that the attempted transfer to the minors was void and ineffectual (R. pp. 29, 30). No error is here assigned by petitioner concerning the ruling of the state Supreme Court upon this specific point, and hence the same stands as a final adjudication for the purposes of the present discussion, that title to said stock did not pass to said minor defendants.

It would seem necessarily to follow from said adjudication that if the attempted transfer of title of the four shares of stock by the executor to the minors was void, the title and ownership of the stock, and the consequent assessment liability, remained in the estate of Moses Green. Such was the decision of the trial court:

> "From the authorities above cited it would appear that if the testator, during his lifetime had transferred the stock to his infant grandchildren, and had survived to this day (fol. 20) that he would be liable for the assessment so levied by the Comptroller.
>
> "It appears to me, therefore, that the administratrix D. B. N. C. T. A., who is the legal representative of the testator *would stand in his shoes*, for as was stated in the case of Smith v. Byers, 102 S. C. 218, 'In fact he (the executor) was the testator (Henry Clark) in possession and he could not claim any rights inconsistent with his duty.'
>
> "It therefore follows, that if the testator were living he would be responsible for the assessment, so far as the four shares, which were placed in the names of his infant grandchildren, are concerned.
>
> "The Court having avoided the contract for the infants, the stock is as though the same had never been transferred from the estate of the testator, Moses Green, and the administratrix D. B. N. C. T. A., being in fact the testator under the authority of Smith v. Byers, *supra*, is the owner of the said four shares of stock." (R. 18)

In support of its position to the foregoing effect the Trial Court cited, inter alia: Aldrich v. Bingham, 131 Fed. 363;

Foster v. Wilson, 75 Fed. 797; Early v. Richardson, 280 U. S. 496. A further case of interest in this connection is Riley v. Bondi, 64 Fed. (2) 515, 517.

The case of Williams vs. Cobb, 242 U. S. 307, 309, 310, supports, by inference, the position that the estate remains liable where the transfer is ineffective because of lack of capacity to accept title or lack of authority to make the transfer. In that case apparently the only reason the estate was not held liable and the assets not permitted to be pursued, was that the transfer of stock had been made to Trustees who were competent to hold title. Accordingly recourse against the estate of the decedent should have been denied, leaving the Receiver to his remedy against the estate of the Trustees held for the beneficiary, under Sec. 66, Ch. 2, Title 12, U. S. C.

It would seem that the reasoning of the trial court is sound and the conclusion there reached inevitable, and consequently, *that the state Supreme Court was in error in holding, in effect,* that the estate of Moses Green did not retain ownership and did not continue liable upon the stock.

The reasoning of the *state Supreme Court* (and its conclusion in the foregoing respect) is not convincing. The opinion on this point states:

> "Moses Green did not make the transfer to his minor grandchildren * * *. As this transfer was not the act of the testator, then the estate of the testator is not liable therefor. That the executor could not make a separate and independent contract tending to bind the estate of the testator is too well established to warrant the citation of authority in support thereof." (R. p. 29)
>
> * * * * * * * * *
>
> "If, therefore, as shown above, the estate of the grandchildren is not liable, for the reason that they could not assume the contractual obligation, and the estate of the testator is not liable, for the reason that the transfer to the grandchildren was not made by him and the executor had no right to make a contract bind-

ing the estate, it follows that no liability for this contingent indebtedness can be placed upon any one or more of the defendants." (R. p. 30)

(B) THE CONTINGENT ASSESSMENT LIABILITY OF MOSES GREEN UPON THE FOUR SHARES OF STOCK SURVIVED HIS DEATH, BECAME A LIABILITY AND CHARGE OR LIEN UPON HIS ESTATE, BECAME AN ABSOLUTE LIABILITY UPON THE LEVY OF THE ASSESSMENT, AND CAN BE ENFORCED BY THE RECEIVER AGAINST THE ASSETS IN THE HANDS OF THE DISTRIBUTEES AND LEGATEES (INCLUDING THE ASSETS RECEIVED BY THE MINOR DEFENDANTS), NOTWITHSTANDING THE ASSETS HAD BEEN DISTRIBUTED AND THE ESTATE CLOSED A CONSIDERABLE PERIOD PRIOR TO THE LEVY OF THE ASSESSMENT.

The trial court relied in part, in support of its findings to the foregoing effect, upon the case of Matteson v. Dent, 176 U. S. 521. We believe that case established the following principles:

(1) The contingent assessment liability of a shareholder of a national bank is a debt or obligation within the meaning of the assessment statutes, and survives against and becomes a charge or lien upon his estate. (See Opinion, pp. 524-525, 526-527.)

(2) Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder. (See Opinion, pp. 526, 527-528, 530.)

(3) The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate and a lien thereon within the meaning of the assessment statutes at the time of such distribution or allotment. (See Opinion, p. 529.)

(4) The liability of the estate for the assessment being established under the foregoing rules, the Receiver can enforce such liability against the allottees or distributees un-

der a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate. (See Opinion, pp. 528-530, 532.)

It will be found from an examination of the case that the first three of the foregoing principles are established without reference to the state law, and as an interpretation and construction of the Federal assessment statutes and their operative effect. The fourth principle only concerns the State law, and then only from the standpoint of the right of the receiver to adopt the State procedure in the pursuit of the assets for the purpose of enforcement and collection of the assessment.

Applying the foregoing principles to the instant case, it follows: that the contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability of, and a charge or lien upon, his estate; that inasmuch as said stock, in legal effect by virtue of the adjudication of the court below, must be considered to have stood upon the books of the bank in the name of the testator, and so stood at the time the assessment was levied and the suit was filed, the estate of Moses Green continued to be responsible for the assessment and charged with a lien for its payment; and that said liability and lien were not affected by the fact that the assessment had not been levied at the time of distribution of the assets of the estate. Hence, considered (for the purpose of argument only) from the standpoint of the *state* law in conjunction with the *Federal* law, *it follows that if the laws of South Carolina permit a creditor to pursue assets of the estate of a decedent into the hands of distributees and legatees, the court below was in error* in holding that the assets of the estate of Moses Green could not be traced to the hands of the defendants, including the minor defendants, for the purpose of satisfying the assessment liability.

The discussion next following (under sub-paragraph (c) of this division of the argument, pp, 21 to 25) will discuss the South Carolina law in that connection. However,

it is also the position of petitioner, as will more fully hereinafter appear (sub-paragraph (d) of this division of the argument, pp. 26, *infra*) that the lien for the assessment liability, having been created by Federal law, follows the assets to the heirs, distributees and legatees and may be enforced regardless of the provisions of state laws.

(c) THE LAWS OF SOUTH CAROLINA MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS, DISTRIBUTEES AND LEGATEES.

The Applicable Statutes of South Carolina making the Assets of the Estate of a Decedent liable or chargeable for his Debts and Obligations.

Sec. 8995, Civil Code, S. C., 1932:

> "The assets which come to the hands of an executor, or administrator, after proper allowance to the executor or administrator, in a due course of administration, shall be applied to the payment of his debts in the following order, that is to say: * * *".

Sec. 9066, Civil Code, S. C., 1932:

> "Houses, lands and other hereditaments and real estates, situated or being within this State, belonging to any person indebted shall be liable to and chargeable with all just debts, duties and demands of what nature and kind soever, owing by any such person, and shall and may be assets for the satisfaction thereof, and shall be subject to the like remedies, proceedings and process as personal estates."

Sec. 9032: "In all cases where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments, descending to him, and shall sell, alien, or make over the

same before any action brought against him, such heir at law shall be answerable for such debt or debts to the value of the said land so by him sold, aliened, or made over.

Sec. 9033: In any of the cases referred to in the last section, creditors shall be preferred as in actions against executors and administrators, and execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments, bona fide aliened before the action brought, shall not be liable to such execution."

The foregoing statutes constitute a reiteration of the ancient non-statutory rules of law under which the assets of the estate of a decedent have always been held chargeable for his debts. These doctrines permit the pursuit of the assets into the hands of heirs, distributees and legatees for the purpose of satisfying the claim of the creditor notwithstanding the assets of the estate may have been distributed and the estate closed a substantial period of time prior to the enforcement of the claim of the creditor against the assets. See Leavenworth Savings & Trust Co. vs. Newman, 23 F. (2) 835, 837; Borer v. Chapman, 119 U. S. 587, 599, 600; Board of Public Works v. Columbia College, 17 Wall. 521, 530; Continental National Bank v. Heilman, 81 Fed. 36, 42, 43, 44 (assets distributed and estate closed); Pyatt v. Waldo, *et al.*, 85 Fed. 399, 400; Chewett v. Moran, 17 Fed. 820, 821, 822 (assets distributed and estate closed); Johnson v. Colbertson, 79 Fed. 5, 6 (assets distributed and estate closed); O'Neill v. Lauderdale, 195 Pac. 121, 124 (assets distributed and estate closed); Chitty v. Gillett, 148 Pac. 1048, 46 Okla. 724 (assets distributed and estate closed); Madison v. Buhl, 8 Pac. (2) 271, 272 (assets distributed and estate closed); Mortimer, *et al.* v. Potter, 72 N. E. 817, 818;

213 Ill. 178. Also see cases cited 18 C. J., par. 308, page 954, note 11.

The South Carolina decisions are to the same effect:

Lanier v. Griffin, 11, S. C. 565, 581-588:

The facts in this case are quite involved and are set forth in great detail in the opinion. Suffice it to say for present purposes, that it involved the right of a creditor of the estate of a decedent to pursue the assets into the hands of heirs, distributees and legatees for the satisfaction of her claim, suit being brought for that purpose about ten years after the settlement of the estate. *The claim of the creditor was contingent in character,* being based upon a bond given by the surety of a guardian who was accountable to the plaintiff-creditor. Paragraphs 3 and 4 of the syllabus epitomize the findings and decision of the Court in so far as pertinent to the instant case, and are as follows:

> "(3. Limitation of Actions—72.)
> "The estate of a deceased surety on a guardianship bond was duly settled up in 1858, without knowledge by executors or others in interest of this liability. The ward married in 1866, and by ante-nuptial settlement her property was assigned to a trustee; in 1867 she attained her majority; in 1868, an action was commenced by the trustee and herself, against executors, legatees and devisees of the surety, demanding payment by them of her claim. Held, that the action was not barred as against any of them by the statute of limitations. Cases reviewed.
> "(4. Wills—830.)
> "Held further, that the legatees and devisees were liable to the ward to the extent of assets received, but that no personal liability attached to the executors."

McNair v. Howle, 116 S. E. 281, 286; 123 S. C. 252.

In this case the assets of the estate of the decedent had been fully distributed and the creditor-plaintiff had failed to file his claim with the administrator within the statutory

period of twelve (12) months provided for the proof of claims. About six months after the discharge of the administrator the plaintiff-creditor made claim against the estate, and in anticipation of a suit against the estate to establish the claim notwithstanding the distribution of the assets, the former administrator, in conformity to the practice prevailing in South Carolina, filed a petition for appointment as administrator D. B. N. The plaintiff-creditor thereupon filed suit and the court held that inasmuch as the estate was solvent the assets in the hands of the distributees and legatees could be followed. The court also pointed out that there were no "*non-claim*" statutes in South Carolina and that the statute requiring proofs of claim against the estate within the specified twelve (12) months (above referred to) had as its primary object the exemption of executors and administrators from liability for devastavit where they had administered and distributed the estates in their charge without reserving assets which would otherwise have been applicable to the delinquent creditor's claim (the statute referred to in the case is carried forward in substantially the same form in this respect as Sec. 8993, Civil Code, S. C., 1932). It may also be observed in this connection that the foregoing case established as a matter of procedure that it was proper to make the distributees and legatees parties *jointly* with the administrator D. B. N. where it was sought to subject the assets received by such distributees and legatees to the payment of the claim. It is in accordance with this procedure, prevailing in South Carolina, that the distributees and legatees, including the minor distributees and legatees, were made co-defendants with Beatrice C. Green, Administratrix D. B. N. C. T. A. For additional South Carolina cases holding that assets of an estate may be pursued into the hands of distributees and legatees for the satisfaction of the claims of creditors, see: Columbia Theological Seminary v. Arnett, *et al.*, 176 S. E. 465; 168 S. C. 272; Hug-

gins v. Oliver, 21 S. C. 147, 161; Wheeler v. Floyd, 24 S. C. 413, 418, 419, 420; Shaw v. Barksdale, 25 S. C. 204, 214, 215; Brock, *et al.* v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 784, 786, 788; Crane, Boylston & Co. v. Moses, 13 S. C. 561, 579.

The liability of the distributees and legatees is restricted, under the foregoing principles, to not exceeding the amount of assets received by them from the estate. In the instant case it may be noted that not only the personal property (R. 8) but the real property (R. 16) respectively, received by the distributees and legatees, including the pro rata shares received by the minor defendants, was far in excess of the amount necessary to meet the assessment liability upon the four shares of stock in question.

Application of the Foregoing Principle of Estate Liability, to Stock Assessment Obligation.

Assuming that it has been satisfactorily developed from the preceding discussion that under the South Carolina law the assets of an estate may be followed into the hands of a distributee or legatee, and the case of Matteson v. Dent having established that this principle may be applied to national bank stock assessment liability, no further citations would appear to be necessary in that connection. Attention may be directed, by way of cumulative authority, to the following assessment cases: Luce v. Thompson, 36 Fed. (2) 183, 185, 186; Zimmerman v. Carpenter, 84 Fed. 747 (see discussion of this case, *infra*, pg. 29); Mann v. Kleisdorff, 16 Fed. (2) 997; Rankin v. Miller, 207 Fed. 602; Gilbertson v. McCarthy, 32 Fed. (2) 665; Rankin v. City of Big Rapids, 133 Fed. 670; Rankin v. Herod, 140 Fed. 661. Also see the following State cases; Gift v. Love, 144 So. 562, 567 (where the estate had been fully administered and closed); Carlisle v. Love, 155 So. 197, 203 (where the estate had been fully administered and closed); Mortimer, *et al.* v. Potter, 72 N. E. 817, 818; 213 Ill. 178.

(D) THE FEDERAL STATUTES CREATE THE ASSESSMENT LIABILITY AND MAKE THE SAME A CHARGE OR LIEN UPON THE ASSETS OF THE ESTATE OF A DECEDENT. HENCE, REGARDLESS OF STATE LAWS, SUCH LIEN FOLLOWS THE ASSETS INTO THE HANDS OF THE DISTRIBUTEES AND LEGATEES, AND ACCORDINGLY THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF MOSES GREEN WERE NOT TRACEABLE TO THE DEFENDANTS AS DISTRIBUTEES AND LEGATEES OF SAID ESTATE.

The general doctrine is thoroughly settled that the national banking laws are a system complete within itself, covering the organization, supervision, and liquidation of national banks, and that the laws of the states will not be permitted to impinge upon or interfere with the operative effect of the Federal provisions.

Cook County National Bank v. United States, 107 U. S. 445, 448;
California Bank v. Kennedy, 167 U. S. 362, 366;
Davis v. Elmira Savings Bank, 161 U. S. 275;
Easton v. Iowa, 188 U. S. 220;
Texas & Pacific Railroad v. Pottorff, 291 U. S. 245, 253;
First National Bank v. Missouri, 263 U. S. 640.

It follows from the foregoing that where, as in the instant case, the Federal law has provided, incident to the liquidation of national banks, not only for assessment liability (sec. 64, ch. 2, Title 12, United States Code), but in effect that such assessment liability, even though contingent or inchoate, shall constitute a lien upon the assets of the estate (sec. 66, ch. 2, Title 12, United States Code; Matteson v. Dent, *supra*), *no state law nor interpretation of the law of a state can defeat the enforcement of the lien and the pursuit of the assets* into the hands of distributees and legatees. In this connection may be noted the following:

Borer v. Chapman, 119 U. S. 587, 600 (*referring to the jurisdiction of equity to pursue assets to satisfy debts of a decedent*):

"As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal court, to be administered by the Circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their courts, and cannot be affected by any legislation except that of the United States." (p. 600)

Continental National Bank v. Heilman, 81 Fed. 36, 44:

"These cases settle the doctrine that the statute of a state prescribing the time within which a suit must be brought against heirs to charge them with an ancestral debt cannot be invoked for their protection in the national courts." (p. 44)

Mortimer, et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178:

In this case, Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will and the decedent's state had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under the trust. The receiver sued the surviving trustee, as trustee (the widow having died), and the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, inter alia, that

the claim was barred because not presented within two years as required by state law. In overruling this contention and holding that the state statute was ineffective against the Federal statutes, the court said (p. 818, Reporter Citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed by it in the probate court. But the remedy under the act of Congress is applicable, *and the estate is liable under its provisions, so long as the assets can be reached.* The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1091, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the

> death of the testator does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra.*" (Italics inserted)

The case of Zimmerman v. Carpenter, 84 Fed. 750, quoted in the foregoing extract from the opinion, contains the statement: "if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." An examination of the Carpenter case indicates that inasmuch as the assets had *not* been distributed, the foregoing observation of the court is obiter dictum and may be disregarded. It is clearly not sound as a matter of law, inasmuch as it is contrary to the cases holding that the assets may be followed to the hands of heirs, devisees, and distributees by virtue of the lien upon said assets for the payment of the debts of the decedent.

For additional cases to the effect that state laws cannot affect the operation of the Federal statutes in this connection, see:

> *Payne v. Hook*, 7 Wall. 425, 430.
> *Chewett v. Moran*, 17 Fed. 820.

It is obvious that if statutes or decisions of a state are to be permitted to bar the enforcement of the assessment liability against heirs, legatees, distributees, where the Federal law has expressly imposed a lien upon the estates of decedents (and with reference to which lien and liability all purchasers of national bank stock must take notice), the purposes of the National Banking Act designed to protect the creditors of the bank in the event of insolvency will be defeated. As indicated, such construction is entirely contrary to the decided cases. To the effect that sec. 66 *does*

impose a lien upon the assets of the estates therein mentioned see:

Gilbertson v. McCarthy, 32 Fed. (2) 665, 667, 668; Luce v. Thompson, 36 Fed. (2) 183, 184, 185; Rankin v. Miller, 207 Fed. 602, 613, 614, 616; Miller v. Hamner, 269 Fed. 891, 894; Rankin v. City of Big Rapids, 133 Fed. 670, 680, 681; Rankin v. Herod, 140 Fed. 661; Drain v. Stough, 61 Fed. (2) 668, 669.

For cases specifically to the effect that the Federal decisions and the principles of law thereby established, must be followed in construing the national banking laws, see:

Davis v. Elmira Savings Bank, 161 U. S. 275; Easton v. Iowa, 188 U. S. 220; First National Bank v. Selden, 120 Fed. 212, 215; Farmers & Mechanics National Bank v. Dearing, 91 U. S. 29; Prigg v. Pennsylvania, 16 Peters 539, 617-619; First National Bank of San Jose v. California, 262 U. S. 366.

Applying the foregoing to the instant case, it would seem clear that the State Supreme Court was in error in deciding that the receiver could not hold the estate of Moses Green liable for the assessment and trace the assets of the estate to the distributees and legatees, including the assets received by the minor defendants, for the purpose of recovering the amount of the assessment upon the four shares of stock in question.

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C., for the amount of the assessment to the extent of the assets received from the

estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention.

The question of the liability of the estate of the minor defendants for the assessment liability under Sec. 66 of Ch. 2 of Title 12, U. S. Code was in issue and was considered by the State Supreme Court and, as previously indicated, it was decided that the attempted transfer of the four shares of stock in question to the minor defendants was void and ineffectual to pass title.

The executor in transferring said stock had the same registered upon the books of the bank in the names of the minors. If it be considered that the intent of the testator should be given effect by treating the title to said shares of stock as standing constructively in the name of the guardian of the estate of said minors, it would follow that the assets of the guardianship estate would be responsible for the assessment at least to the extent received from the estate of Moses Green. Hence, whichever view be adopted, whether on the theory of title remaining in the testator, Moses Green, with the consequent liability on his estate and the right to pursue the assets to the distributees and legatees, including the minors, or whether upon the theory of title passing constructively to the guardian of said minors, with the consequent liability of the guardianship assets for the assessment under Sec. 66, Ch. 2, Title 12, U. S. C., the result would be the same so far as the Receiver is concerned and would permit recovery by the receiver from said assets for the amount of the assessment. It will be recalled in this connection that the minors, as well as each of the adult defendants, received personal as well as real estate, greatly in excess of the amount of the assessment. (R. pp. 8, 16) Hence, considering this matter from the standpoint of an alternative assignment of error, the state Supreme Court committed error in not permitting the assets of the minor defendants to be applied toward the payment of the stock assessment.

It is, of course, settled practice that this court may, if it sees fit, review the entire case, and decree such relief as may be appropriate under all of the circumstances. Cole v. Ralph, 252 U. S. 286, 290.

III. The State Supreme Court was in error in reversing the judgment of the Court of Common Pleas in so far as the same affected the adult defendants, for the reason that said adult defendants did not appeal from the judgment of the Court of Common Pleas.

The appeal from the decision of the Court of Common Pleas to the State Supreme Court was taken only by Beatrice C. Green as administratrix, D. B. N., C. T. A., of the estate of Moses Green, deceased; Beatrice C. Green, as guardian for Helen Green, Herbert Green and Allen Green; and H. W. Hennig, as guardian ad litem for Helen Green, Herbert Green and Allen Green (R. pp. 25, 27).

The State Supreme Court held, that the assessment could not be collected from the assets taken over by *any of* the defendants as distributees and legatees, and the effective part of the decision or decree provided:

> "The judgment of the Circuit Court is, therefore, reversed and the complaint dismissed under Rule 27 of this court." (R. p. 31)

It would seem clear that the State Supreme Court was in error in reversing the decision of the Court of Common Pleas in so far as the judgment of the Court of Common Pleas related to and was binding upon the adult defendants who did not take an appeal to the State Supreme Court. It is true that in the course of rendering its decision and as an integral part of its reasoning in the opinion, the State court could appropriately *take the view* that *none* of the defendants as distributees and legatees (including the adult defendants) could be held responsible for the assessment liability to the extent of the assets received as such dis-

tributees and legatees. Nevertheless, when the decree was formulated putting its decision into effect, it would seem that the State Supreme Court properly *should have provided* that the judgment of the Court of Common Pleas must be reversed *only* in so far as the same sought to hold the assets acquired by the infant defendants as distributees and legatees and that such reversal *should not affect* the judgment of the Court of Common Pleas subjecting the assets acquired by the adult defendants as distributees and legatees to the payment of the assessment.

It may also be suggested that where a judgment has been rendered from which no appeal has been taken, the judgment creditor acquires a vested property right, and it would consequently appear that the action of the State Supreme Court in setting aside said judgment in the absence of appeal by the defendants against whom it is operative, constitutes in effect a deprivation of the receiver of his property in said judgment without due process of law, contrary to the Fourteenth Amendment. Also see discussion in this connection, *supra*, p. 12.

H.

CONCLUSION.

We believe, in view of the foregoing, that this court has jurisdiction to review the judgment of the court below, and that said judgment should be reversed.

Respectfully submitted,

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I.

APPENDIX.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT.

J. C. SEABURY, as Receiver of the City National Bank of Sumter, S. C., a national banking association, *Respondent,*

against

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, LEON M. GREEN, ALVA I. GREEN, AARON H. GREEN, ETHEL GREEN BLATT, BEATRICE C. GREEN, as Guardian for Helen Green, Herbert Green and Allen Green, and HELEN GREEN, HERBERT GREEN and ALLEN GREEN, *Defendants.*

IN RE: Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased; Beatrice C. Green as Guardian for Helen Green, Herbert Green and Allen Green, and H. W. Hennig, as Guardian ad litem for Helen Green, Herbert Green and Allen Green, *Appellants.*

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the State of South Carolina:—

The petition of the undersigned petitioner, who is the attorney for the respondent in this cause, respectfully calls to the attention of the Court points which your petitioner thinks that the Court has overlooked or misapprehended in rendering your decision in the above entitled cause.

I.

That in the opinion of the Court this language is used "it follows that no liability for this contingent indebtedness can be placed upon *any one or more of the defendants.*"

It is respectfully submitted that four of the defendants in this cause, never appealed from the judgment rendered against them. That is, under the Decree of his Honor

Judge Mann, the inheritance of the four *adult* defendants under the Will of Moses Green, deceased, was subjected to the payment of this statutory liability and since no appeal was taken from that Decree by any of the four adult defendants, the question is *res adjudicata* as to them and stands as a judgment in rem against such property as they hold as devisees of Moses Green, deceased.

If a party is aggrieved by any Order or Decree of the Court, he has a right to appeal and failing to do so, he is bound by the Decree or Order against him. That being so, the Decree of Judge Mann fixes the liability of the adult defendants, so far as to the property which they took under the Will of Moses Green, deceased, is concerned. That property is subject to the Four Hundred ($400.00) Dollar assessment set forth in the Complaint, there being a judgment in rem against it, and it is respectfully submitted that this Court has overlooked this fact and the opinion should be corrected accordingly.

II.

It is respectfully submitted that attention is called to paragraph 12 of the Complaint (F. 13) as follows, "the real and personal property in the hands of the defendant (other than the administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased) as heirs at law (as devisees) of the said Moses Green, deceased, is subject to the assessment as above set forth." And the Answer of Leon Green and the other adult defendants (F. 28), does not controvert this. This Answer has two aspects. In the first aspect (first defense) these adult defendants deny that they are personally liable for this assessment and deny that the estate of Moses Green is liable for it. In the first place, there is no allegation in the complaint that the adult defendants are personally liable for the assessment, and in the second place this is no denial of any allegation of the complaint. And in the next place, that the Estate of Moses

Green is liable is not any denial of any allegation of the complaint, and states no fact but only a conclusion and is respectfully submitted that the so-called First Defense, is no defense at all. That it does not conform to the rule of pleading; that all facts stated in the complaint are deemed to be true unless controverted. In addition to this, these adult defendants filed an argument, the burden of which is that the property received by them, from the estate of Moses Green, should not be liable unless that property received by the minors should be insufficient to meet the assessment.

It is respectfully submitted that the Court has given relief to these defendants, that they practically have not sought and as a matter of law they are not entitled to it, and for the reason, first, that they have not set up any defense in their Answer, as we have attempted to show, and the next place, judgment having gone against them and they not having appealed, their liability became fixed by the judgment of the Circuit Court, and, at the most, this Court could only relieve the appellants.

III.

The Court, in the opinion in this case, holds, first that the Estate of Moses Green is not liable, and second, that none of the devisees and legatees under his Will are liable to the extent of the property taken by them as such.

This conclusion is reached by the reasoning of the Court that "Moses Green did not make the transfer to his minor grandchildren, they took the stock as allotted to them by the executor in making a division of the estate, in the residuary clause contained in the Will. The instructions for division of the residuary estate into five parts, no where said that the grandchildren should receive any portion of the bank stock."

That under Item 9 of the Will, the testator divided the balance of his estate as follows: "All the rest and residue

of my estate, real, personal or mixed, of which I may be possessed or entitled to at the time of my death, shall be divided as follows: *one-fifth* thereof to the children of my deceased son, Harry Green, namely Helen, Herbert and Allen," and it is respectfully submitted that by the use of the word "thereof" the testator specifically intended for the executor to divide the property in kind, giving to the children of the deceased son, Harry Green, one-fifth thereof. Had he not intended for the property to be divided in kind, including the bank stock, he would have used words similar to these, "one-fifth of my estate to my grandchildren"; but the use of the word "thereof" clearly imports that the testator directed his Executor to divide the bank stock together with the other property in kind, if the same were divisable; the Will did not provide that the stock should be sold and the proceeds distributed, but that the Estate should be divided.

"It is the right and duty of a personal representative * * * to make distribution of decedent's property in the manner directed by the Will * * * or in case of intestacy * * * in the manner prescribed by law." 24 C. J., 463. Therefore, if he directed the same to be divided, then it was the same as though he had given the bank stock during his lifetime to his infant grandchildren, and the liability of the estate would be the same.

IV.

The Court uses the following language "as this transfer was not the act of the testator, then the estate of the testator is not liable therefor."

It is respectfully submitted that the act was the act of the testator with directions to the executor to divide the property into fifths, the period for distribution to be made, of course, after his death by his executor, but the gift itself was the gift of the testator under his Last Will and Testament. The stock was not the property of the Executor to

dispose of, he was merely the dispenser of the goods of the dead. The testator, by his Last Will and Testament in writing, gave the stock to his children and grandchildren in the proportion set forth in the Will.

It is respectfully submitted that the case of Conner vs. McSween, 164 S. C., 348, is applicable to the present case. In both events the gift was the gift to a minor. The delivery, in one event, was during the lifetime of the donor, and in the present case the delivery was after his death.

The attention of the Court is called to the case of Smith against Byers, 102 S. C., 218, wherein the Court states that the administrator (executor) is the personal representative of the deceased. What then does this term import if not that he is the same as the testator for the purposes of carrying out his wishes as expressed in his Will, or administering his property if he died intestate. The Court, in this case (Smith vs. Byers, 102 S. C., 218) lays down the rule that the personal representative of the deceased, is in fact the testator, for the purposes of administering the estate. That being the law of this State, the act of the executor was the act of the testator and it is respectfully submitted that the Estate should have been held liable for the stock assessment, for it was the gift of Moses Green to his infant grandchildren, the delivery thereof postponed until after his death.

If infants have no legal capacity to contract for liability upon bank stock, and if, under the authorities cited in the opinion, the Court will avoid the contract if it results to their detriment, then upon whom does the liability rest? The Court says, referring to Conner vs. McSween, 164 S. C., 348, that the transferor would be liable if living. Then it is respectfuly submitted that under the Federal Statute, fixing the liability for stockholders in National Banks, and the decisions thereunder, that the estate of Moses Green is liable to the same extent for a transfer made by the executor, under the Will, as though the testator would have been himself, had he made the transfer while he was living.

"Liability of estate in the hands of executors is not limited to such demands as were existing claims at the time of the death of the testator, but "if the liability was created after his death, and while the shares of stock formed part of his estate, then under the provisions of this section the estate becomes responsible for such liabilities." Wickham v. Hull (C. C. Iowa, 1894), 60 F. 326.

It may be argued that the shares of stock did not form a part of the estate at the time of the levy. This is true so far as the adults who took under the Will are concerned, because they were *sui juris,* but so far as the infants were concerned, the contract has been avoided, the liability must rest somewhere under the statute. It cannot be like Mohammed's coffin, suspended "in midair"; someone is liable and yet the language of the opinion is as follows, "no liability for this contingent indebtedness can be placed upon any one or more of the defendants." How then is the provisions of the statute to be enforced, if neither the estate of the testator nor any of the defendants are liable therefor. It is true that in a great many instances the liability cannot be collected, but nevertheless a contingent liability exists upon every share of stock issued by a National Bank. It is respectfully submitted that this decision nullifies the provisions of the Federal Statute.

The Court bases its opinion upon the case of Williams vs. Cobb, 242 U. S., 307. The facts in that case were that a devisee or legatee was attempted to be held for stock which was transferred from the estate from which he inherited and the Court held in that case that the transfer to the Trustees, under the Wisconsin Statute, was a valid transfer and the Trustees were legally capable of holding stock as such and therefore the devisee or legatee, who was sued was not liable to the extent of the property held by him as such. In the present investigation the minors did not have the legal capacity to assume the liability and therefore the case of Williams vs. Cobb is not applicable to the facts in this case.

V.

The Court uses this language "it might also be given as the reason for non liability of the estate, that during the administration of the estate by the executor, *no claim* on the part of the *depositors* * * * existed in their favor against the estate of Moses Green." Under the Federal Statute, upon which this suit was brought, the benefit is for the benefit of the *creditors* and not the depositors and the Federal Statute was plead in the complaint by the plaintiff in this cause (see paragraph 11, FF 13). It therefore is respectfully submitted that the only law applicable to this case would be the Federal Statute and the decisions thereunder.

The decision as written nullifies the Federal Statute fixing liability for bank stock. The decision in brief holds neither the Estate of Moses Green, nor any of his devisees of legatees to the extent of the property held by them as such is liable, which in effect holds that no one is liable on the four shares of stock. Carrying this conclusion to the nth degree, if Moses Green had owned ninety-nine per cent of the stock, and his Will had fixed the rights of his children and grandchildren as it did in this case, then the *creditors* of the Bank would not be able to obtain a judgment on ninety-nine per cent of the stock outstanding, although the statute gives that right.

I, the undersigned attorney for the petitioner, do hereby certify that there is no specific property involved in this case and for that reason it is not necessary for the appellants and defendants who have not appealed to personally sign this consent in writing for the status of the property involved in the case to remain undisturbed.

RAYMON SCHWARTZ,
Petitioner for Respondent.
(Respondent in State Supreme Court being Bank Receiver.)

I certify that in my opinion there is merit in the grounds stated in the foregoing petition for a rehearing, and that I am not in any way concerned or connected with the case.

My opinion is that the Court has overlooked material matters of law, in reaching its conclusion. That this conclusion, on my part, is reached after having taken up the record on appeal, the briefs of the defendants who did not appeal and the brief of the appellants and of the respondent. I have carefully studied the opinion of the Court, and in all matters relating to the case have viewed it just as though I was sitting as a member of the Court.

The complaint sets out the facts relating to the assessment and alleges that the property, in the hands of the adult defendants, is liable to such assessment. The Answer of these adult defendants practically does not controvert any allegations to the complaint. There is no allegation of the complaint alleging that they are personally liable, and hence their denial of this raises no issues and the denial as to the estate of Moses Green simply states a conclusion. It may be that ordinarily, where the foundation of the suit falls, the liability of all persons connected with it would fall, such as the case of granting an injunction, where the complaint is dismissed the injunction goes with it. But in this case it is sought to hold the property of the estate of Moses Green in the hands of these adult defendants liable, and they admit that such property is liable—it is so alleged in the complaint and not denied. The judgment of the Circuit ordered such property to be subjected to the payment of the assessment and they did not appeal. It is respectfully submitted that it would be a far-reaching precedent to relieve parties to a suit from a judgment from which they did not appeal, and therefore confessedly by such act say they are liable to perform. In making this certificate, I am fully aware of the rule of Court as to the courses that should be pursued by an attorney before making a certificate, and hence before making it endeavored to comply in all respects to the rule of this Court in respect to the relation thereto and have most carefully studied the entire record.

Signed R. O. Purdy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 434.

J. CONGDON SEABURY, as Receiver of the City National Bank of Sumter, South Carolina,
Petitioner,

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al.,
Respondents.

List of Cases Concerning the Point that it is not Necessary to Present Claim During Course of Administration of Estate Where the Same Accrues or Becomes Due After the Death of the Decedent or the Closing of the Estate.

GEORGE P. BARSE,
RAYMON SCHWARTZ,
Attorneys for Petitioner.

F. G. AWALT,
J. H. BREWER, JR.,
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Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respectfully submitted,

GEORGE P. BARSE,
RAYMON SCHWARTZ,
Attorneys for Petitioner.

F. G. AWALT,
J. H. BREWER, JR.,
Attorneys for Comptroller of Currency,
Of Counsel.

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MEMORANDUM ON BEHALF OF RESPONDENTS.

Supreme Court of the United States

OCTOBER TERM, 1934.

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J. CONGDON SEABURY, AS RECEIVER OF THE CITY NATIONAL BANK OF SUMTER, S. C., A NATIONAL BANKING ASSOCIATION,
PETITIONER,

vs.

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A. OF THE ESTATE OF MOSES GREEN, DECEASED, ET AL., RESPONDENTS.

MEMORANDUM ON BEHALF OF RESPONDENTS IN REPLY TO PETITION FOR WRIT OF CERTIORARI, AND THE PETITIONER'S BRIEF THEREOF.

SAMUEL WANT,
Darlington, S. C.,
Attorney for Respondents.

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RE-STATEMENT OF ISSUES PRESENTED BY PETITION.

In the court of original jurisdiction (Court of Common Pleas of Sumter County, South Carolina), the questions presented arose upon the following material facts (presented by admissions in the pleadings and by an agreed statement of facts):

Moses Green died in March, 1927, while the owner of a number of shares of stock of City National Bank of Sumter, South Carolina. This stock passed under the residuary clause of Mr. Green's will. Four shares of the stock in this manner came into the hands of the three infant respondents, grandchildren of the testator. The testator's estate was duly wound up, and the executor discharged. Thereafter, in July, 1932, the bank closed. In August, 1932, payment of the stockholder's liability was demanded of the infants, through their guardian. The demand being refused, an administratrix d. b. n., c. t. a., of the estate of Moses Green was appointed, and the receiver of the bank brought suit to recover the liability on the four shares in question. The defendants in this suit were the administratrix, the adult legatees and devisees of the testator, and the infant stockholders.

The material questions presented upon this state of facts were:

I.

Could the liability in question be enforced against such of the property of the infant stockholders as they had received under their grandfather's will?

II.

If the first question is answered in the negative, could the liability be enforced against the testator's estate as such, thereby subjecting to the liability the property devised to adults and infants alike?

The court held (transcript, folios 87, *et seq.*) (1) that the liability is enforceable against the property which the infants took as legatees and devisees under the will of their grandfather; (2) that if such property proved insufficient to discharge the liability, the property received under the will by the adult legatees and devisees should be subjected to the liability.

The appeal told the Supreme Court of South Carolina was prosecuted "by the administratrix d. b. n., c. t. a. of the estate of Moses Green, deceased, and on behalf of the infant defendants herein". (Transcript, p. 1.)

The Supreme Court of South Carolina, reversing the lower court, held: (1) that the property received by the infant stockholders under their grandfather's will could not be subjected to the liability; (2) that the estate of the testator is not liable (and that, in consequence, "no liability for this contingent indebtedness can be placed upon any one or more of the defendants").

Seabury [illegible], v. *Green, et al.*, 175 S. E. 639, 641.

As to the governing federal statute imposing the extra liability upon stockholders of national banks, the State Supreme Court made only one comment—that the statute is not "sufficient to cover the very peculiar facts existing in this case." *Ibid*, pp. 641-642.

The petition for the writ of *certiorari* does not touch that part of the decision of the State Supreme Court which exempts from liability the property received by the infants under the will of the devisor of the stock. It challenges (1) that part of the holding which prevents the appellant from holding the infants liable indirectly to the extent of their proportionate interest in the residuary estate of the testator, and (2) that part which, regardless of the status of the infants, holds that the adult respondents (as devisees and legatees of the testator) are not liable to the extent of the property which they received under the will.

It appears that the petition presents only two material questions:

I.

Has the State Supreme Court construed the governing federal statute quoted in the petition, page 10, thereby raising a federal question?

II.

Has the State Supreme Court by its decision violated the "Due Process Clause" of the Federal Constitution, through holding that the adult defendants are not liable, even though (as it is alleged) they did not appeal from the decision of the lower court holding them liable.

LEGAL QUESTIONS.

I.

Has the State Supreme Court construed the governing federal statute quoted in the petition, page 10, thereby raising a federal question?

The statute does not in terms touch the issue. The point in issue is undoubtedly an appropriate subject for Congressional legislation, to insure uniformity of decision throughout the country, as well as for other reasons. However, in the absence of statute, after a testator's estate has been distributed, does not the law of the State determine the status of the title to the testator's property that passes into the hands of his devisees and legatees? If a state statute had been enacted to decree the title free of any lien or claim of a contingent and (at the time of distribution) unenforceable character, its validity would hardly be challenged in this cause. A decision of a court of competent jurisdiction has like effect.

Crary v. *Devlin*, 154 U. S. 619.
Kennard v. *Nebraska*, 186 U. S. 304.
Chemical National Bank v. *Hartford Deposit Co.*, 161 U. S. 1.
Capital National Bank v. *First National Bank*, 172 U. S. 425.

Although in a remote sense the application of a federal statute is involved, there is not only an entire absence of any substantial federal question, but also it is apparent that the problems before the State Supreme Court involved primarily questions of State law, which may be taken to be decisive of all of the material issues presented. The disposition of these questions of State law, involving the status of a title passing from a testator to his legatees and devisees would seem to exclude the idea of a construction of the federal statute in question.

Browne v. *Union Pacific Railroad Company*, 267 U. S. 255.
Howat v. *Kansas*, 258 U. S. 181.
McCoy v. *A. S. J. Shaw*, 277 U. S. 302.
Broad River Power Co. v. *S. C.*, 281 U. S. 537.

II.

Has the State Supreme Court by its decision violated the "Due Process Clause" of the Federal Constitution through holding that the adult defendants are not liable, even though (as it is alleged) they did not appeal from the decision of the lower court holding them liable?

The petitioner predicates his contention in this regard upon the theory that since the lower court held the adults liable, and they did not appeal from this ruling, the State Supreme Court did not have the power to rule that they cannot be held liable under the facts of this case.

The constitutional question thus sought to be raised could and should have been presented in the first instance in the petitioner's petition for a rehearing before the South Carolina Supreme Court. Such a petition was filed (see petition for writ, p. 10).

Under the local practice, opposing counsel are not served with copies of a petition for rehearing in the South Carolina Supreme Court, so that the writer is not informed as to the contents of such petition, but it is a reasonable assumption that the constitutional issue now raised by the petitioner was not presented before the South Carolina Supreme Court, since no contention is made that it was presented.

It would, therefore, appear that this ground of the petition for the writ must fall, because it is presented for the first time in this Court.

It would also appear that this ground should fall, because the petitioner's assumption that the adults were not before the Supreme Court through their failure to take individual appeals is an erroneous assumption. The parties before the State Supreme Court were the administratrix of the testator's estate, and the infant stockholders. Were not the adult defendants thus before the Court by representation? The only theory upon which the administratrix could have been made a party defendant in the beginning was that the liability of the adults and infants alike could be enforced, if declared by the Court, through the administratrix, she standing in the place of the testator.

In all events (disregarding the petitioner's error in basing his position upon the 5th Amendment to the Federal Constitution, when he undoubtedly intended to refer to the 14th Amendment) the action of the State Supreme Court in this case presents no federal question. The decision of the State Supreme Court exempting the adults from liability, amounts to a holding that under the South Carolina law and practice, the Supreme Court has the power to deal with all of the issues presented in the appeal, and to finally dispose of the same as to

all interested parties, even though some of such parties have failed to join in the appeal. In so holding, the State Supreme Court did not infringe any constitutional principle.

King v. *West Virginia*, 216 U. S. 92.
Moss v. *Rainey*, 239 U. S. 538.
John v. *Paullin*, 231 U. S. 583.

Respectfully submitted,

SAMUEL WANT,
Attorney for Respondents.

Darlington, S. C., October 22nd, 1934.

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APPELLANT,

against

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF MOSES GREEN, DECEASED, ET AL., RESPONDENTS.

BRIEF ON BEHALF OF RESPONDENTS.

NO FEDERAL QUESTION INVOLVED.

(A)

STATUTORY QUESTION.

To sustain the jurisdiction of this Court, appellant takes the position that in denying him relief below, the Supreme Court of South Carolina construed and applied a federal statute, to-wit, the statute imposing the extra

liability upon stockholders of national banks; and that by such construction and application it deprived him of a judgment to which, under the statute, he is entitled.

The statute is quoted on page 10 of appellant's petition for the writ.

As applied to the present case, the appellant's position is, in effect, that the State Court did one or both of the only two things that could involve a construction or application of the statute in question, to-wit: (1) decided who is the stockholder liable in this case; and/or (2) exempted from liability under the statute a person found to be a stockholder, or who should have been found as such.

On the first point, appellant and respondent are in accord that the stockholder was the decedent, and is now the representative of the decedent. This representative is the administratrix, c. t. a., d. b. n., respondent here. Hence there is no ground of appeal on this score.

On the second point, bearing in mind the dual (legal and equitable) character of the proceeding, the South Carolina Supreme Court should not be taken to have decreed that by reason of the above situation, the liability cannot be enforced. No contest is made as to the propriety of the appointment of the administratrix, so that suit for the liability may be brought, and there is in this Court no contention that a judgment may not be rendered against the administratrix for the purpose of reaching undistributed assets that may ultimately be discovered.

The ultimate question involved in this case appears to be one relating to the character of title to property which comes into the possession of devisees after the testator's death, and after the testator's estate has been wound up. Is any federal question involved in the declaration of state policy that titles are not affected by contingent liabilities of the testator which are not provable, and, indeed, have not accrued in the remotest sense at the time of the testator's death or at any time during

the period of administration of the testator's estate? The question is answered by the decision of this Court in the case of *Matteson* v. *Dent,* 176 U. S. 521, 529-30. In that case it was expressly held that the question whether the distribution of the estate of a decedent who had owned stock in a national bank which closed after the distribution of the estate and the allotment of the stock to the next of kin, is "wholly dependent" on the law of the state in which the question arises.

That case arose in the State of Minnesota. The law of that state (quoting from the opinion of this Court, p. 530), "as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question".

And this court goes on to say that this consideration demonstrates that no substantial federal question is involved, except for another position taken by appellant in that case, which is not pertinent here.

There is no governing statute on the subject in South Carolina. The law of the case, however, can be made with equal force by the State Supreme Court, as was done here.

It is not doubted that Congress would have the power to cover the present situation with a federal statute similar to the Minnesota law above referred to, so as to create uniformity in the imposition of the liability in question. But as the law now stands, the matter is one which Congress has not seen fit to deal with, leaving the field entirely open for the application of the law of the state in which the question arises.

Appellant places great emphasis on the fact that the result of the holding of the South Carolina Supreme Court in this case is the creation of a situation in which the extra statutory liability attaching to the stock in

question under the federal statute is lost. That would not be true under respondents' theory, which would entitle the appellant to enforce the liability against any assets of the estate that might be available for administration in the future.

And it is to be borne in mind that the present situation does not arise, fundamentally, from any hiatus in the law. In view of the fact that the infants were incapacitated under the law to take the stock, the delivery of the stock by the executor to them was an unfortunate mistake on the part of the executor. The law did not require him to adopt an interpretation of the will which involved the doing of an abortive act. He could have sold the stock and delivered the proceeds to the children. Had he done so, he would not have violated the true spirit of any specific direction of the testator, and, on the other hand, would have maintained the status contemplated by law, to-wit: the ownership of the stock by a person legally competent to take the same, and to assume the contractual liability attached thereto.

On principle, the situation here presented is not unlike that followed in the case of *Williams* v. *Cobb*, 242 U. S. 307, where, under somewhat similar circumstances, it was held that neither the testator's estate, nor the testator's legatees and devisees, could be held liable, when it became apparent that the transfer of national bank stock owned by the decedent had been made to trustees who did not have the legal power to take the stock.

On the issue whether a federal question is involved, it is, of course, wholly immaterial whether the liability on the stock is actually collectible. It is sufficient that the decision of the South Carolina Supreme Court has avoided any construction of the federal statute by holding in legal effect (in accord with the decisions of this Court) that the infants are not liable; and that while the property of the testator in the hands of his legatees and devisees cannot, under the present circumstances, be followed, the administratrix, c. t. a., d. b. n., stands in the shoes of the

testator. There is also in the decision the plain intimation that (as in the case of *Williams* v. *Cobb, supra*) the problem now presented arises not from any hiatus in the law, but from the acts of persons who created the present problem by improvidently dealing with the stock in a manner not authorized by law. So that the decision of the State Supreme Court does not, as suggested by appellant, amount to a holding that the liability attaching to the stock has been destroyed by the decision below, but, on the other hand, suggests, by inference, at least two sources to which the Comptroller of the Currency may look, if he desires to right the legal wrong that has been done. That is to say, he can get his judgment against the administratrix, c. t. a., d. b. n., if he concludes that there is any reasonable probability that assets will come into her hands in the future. Or he can resort to the executor whose act in transferring the stock to the infants, when he should have distributed the same to the adults (and substituted other property therefor), or sold the same and distributed the proceeds, is the cause of the predicament in which the appellant now finds himself.

If the view of respondents that the question here presented is wholly one of State law (involving the status of title to real estate of a decedent) is considered too limited, at least it would appear that in all events the decision of the South Carolina Supreme Court can as well be said to rest on that ground, as upon the ground of a construction of a federal statute. At most the judgment of the lower court can be said to rest on two grounds, one involving (according to appellant) the construction of a federal statute, and the other a question of State law and State policy in respect to the devolution of title to property. In either of these views, or if it appears to the Court that there is uncertainty as to the ground upon which the judgment below was based, this Court will not entertain jurisdiction. *Lynch, et al., Commissioners,* v. *New York,* decided October term, 1934, by this Court.

(B)

CONSTITUTIONAL QUESTION.

In the memorandum on behalf of respondents on the petition for a writ of *certiorari*, it is stated (page 6) that the constitutional question presented by appellant (to-wit, that the appellant was deprived of property without due process of law, by reason of the action of the South Carolina Supreme Court in reversing the judgment as to the adult defendants who did not appeal) was first made in this Court, and that, therefore, the point is not properly before the Court. Appellant's counsel apparently contends that this point was made below by the statement in italics near the top of page 8 of his brief, as follows:

> "The attorney for the appellants does not represent the adult defendants in this cause, therefore, this exception (i. e.) relating to the real estate in the hands of the adult devisees, cannot affect the rights of the respondent as to them."

And the appellant may also be relying on his statement on page 7 of his brief below, in which he says that the failure of the adult defendants to appeal from the judgment rendered against them in the court of original jurisdiction, makes the said judgment *res adjudicata* as to them.

Respondent's counsel does not think that these bare statements raise any constitutional question, but that the same were taken by the Court below as merely a statement of fact on behalf of the present appellant to emphasize that counsel for the respondents here does not represent the adult heirs.

Of course, in his argument below, there was no occasion for appellant's counsel to raise any constitutional issue, for the decision in the first instance was in his favor, and he probably did not anticipate the possibility

of a ruling against the non-appealing adults, but in his petition for a rehearing in the Court below, a distinct opportunity was presented for raising the constitutional issue now relied upon, and there is no suggestion in the record that in such petition any constitutional or other federal question was raised in the South Carolina Supreme Court.

But in any event the fact is that the non-appealing adult heirs were fully represented in the South Carolina Supreme Court. The present respondent, the administratrix, c. t. a., d. b. n., was the representative of the testator's estate, and of any persons against whom liability could be asserted through the estate. And in that capacity the respondent vigorously asserted before the South Carolina Supreme Court the contention of non-liability on behalf of the adult heirs.

This must have been the view of the matter taken by the Court below. And since the adult heirs, who did not individually appeal, filed a brief in the lower Court (which brief was adopted by the present appellant as a part of his own argument), it is clear that in any aspect of the case the adult heirs were represented in the lower Court in the same manner and form, and with the same result, as if they had actually appealed.

The State Supreme Court took the view that under the South Carolina law and practice, it had the power to deal with all of the issues presented by the appeal, and to finally dispose of the same as to all interested parties. In so holding, the Court did not infringe any constitutional principle.

King v. *West Virginia*, 216 U. S. 92;
Moss v. *Rainey*, 239 U. S. 538;
John v. *Paullin*, 231 U. S. 583.

Issues on the Merits.

Much of appellant's argument in this Court deals with legal propositions that are not in dispute.

Counsel are in agreement that the transfer of the stock to the infants imposed no liability upon them; that if the bank had closed either before the death of the testator, or after his death, but before his estate was wound up, the estate, or the assets thereof in the hands of the devisees, would have been liable; that even though the bank closed after the death of the testator, and after the winding up of his estate, the assets of the estate in the hands of the heirs and devisees would have been liable, if there had been any element of fraud or collusion, such as was presented in the case of *Luce* v. *Thompson,* and other authorities relied upon by the appellant; also that, if the stock had been delivered to the adult legatees, and they had failed to have the same transferred upon the books of the bank, they could not (even though the bank did not close until after the estate had been wound up) escape liability. See *Matteson* v. *Dent,* 176 U. S. 521.

In the present case, the situation is exactly what it would have been if the stock had remained in the name of the testator. The bank remained open for more than five years after the testator died, and for about four years after his estate was distributed, and the sole question is whether or not, under such circumstances, in the absence of any element of fraud, the Receiver is entitled to follow the assets of the estate in the hands of the devisees and legatees, especially in view of the fact that the difficulty of collection is due alone to the act of the executor in making an improper distribution of the stock, and the inadvertent action of the bank itself in permitting the transfer to be made.

The decisions of the South Carolina Supreme Court relating to the enforcement of an obligation of the decedent against the assets of the estate in the hands of his devisees and legatees, cited by appellant, are wholly in-

applicable to the present case. They relate to obligations of the decedent, which had accrued and were known at the time of the testator's death. This construction of those cases is expressly set forth by the South Carolina Supreme Court in the opinion rendered in the present cause.

And it is readily perceived that the obligation attaching to bank stock is not of the character of the obligations contemplated by the decisions in speaking of the liability of a decedent's estate (in the absence of statutes of the character involved in the case of *Matteson* v. *Dent*).

There must be some point at which the contingency of the extra liability attaching to the ownership of bank stock is abated as a claim against property formerly owned by the owner of the stock, when such owner dies. In this case, the bank remained open for nearly five years after the testator's estate was completely wound up. In other cases the bank might remain open for many years under a similar state of facts. Is the title to the real estate taken by the testator's devisees of so infirm a character that they may not safely deal with it as their own for fear that the property, or its proceeds, may at some future date be impounded, in the uncertain event of the closing of the bank?

It is earnestly submitted that while the liability attaching to the ownership of bank stock is admittedly contractual, it is nevertheless so inchoate in character and so far beyond the control and knowledge and foresight of the owner of the stock (prior to the failure of the bank) as not to be either (1) a provable claim against a decedent's estate, or (2) a contingent liability for which the executor may be required or expected to make provision, or (3) a contingent liability, which the testator's devisees should anticipate as one that they may be called upon to pay in the changed circumstances that will arise if they expend money in improving the property or sell it and invest or use the proceeds.

As hereinbefore suggested, the ultimate question involved in this case appears to be one relating to the

character of title to property which comes into the possession of devisees after the testator's death, and after the testator's estate has been wound up.

In form, the decree of the Supreme Court of South Carolina denies to the appellant the right to a judgment in this case. In legal effect, however, the opinion of the Supreme Court amounts to no more than a declaration that the appellant is not entitled, as he claimed to be, to enforce his claim, (1) primarily against the property which the infants received under the will of the donor of the stock, or generally against (2) the property which the adult and infant devisees received under the will.

There being no suggestion that the administratrix appointed for the purposes of the present suit had in her hands any assets of the estate, or that there was any possibility of her obtaining such assets in the future from hitherto unexplored sources, the entry of judgment against her would have been an empty formality, in view of the further ruling of the Court that the property now in the hands of the devisees may not be subjected to the payment of appellant's claim. It will be observed that (as permitted under the Code practice prevailing in South Carolina) the appellant did not merely bring an action to recover a judgment for the alleged debt. He brought a combined legal and equitable proceeding; legal in the sense that he sought an adjudication of the indebtedness; equitable to the extent that he made his complaint a creditor's bill to subject the real estate in the hands of the devisees to the payment of his claim.

Had the appellant suggested to the Court that he desired merely an adjudication of the indebtedness, to be enforced against any property of the estate that may in the future come into the hands of the administratrix, or of her successor, he would have been entitled to such judgment, and respondents concede that in this Court, even in the present proceeding, their resistance of the appellant's claim should not go to the point of denying

the right to such judgment, if the appellant's contention that he is entitled to enforce the same against property which has already passed into the possession of the testator's devisees and legatees is subject to be impounded is not made a part of the judgment.

* * * * * *

If it should be the view of this Court that the assets of the testator in the hands of his legatees and devisees can be followed under the circumstances of this case, but that the liability here asserted is collectible as against all of the legatees and devisees (adults and infants alike) according to the proportionate interests of the testator's estate received by them under the will, and that the Receiver is not entitled to collect the whole of the liability out of the testator's estate that went into the hands of the infants, it is respectfully suggested that in such event this holding should be specifically declared. It is the understanding of respondents that appellant not only seeks to establish the liability in question as one enforceable against the distributed assets of the testator, but also that it is one that, in his discretion, he can enforce primarily against the infants alone. The Receiver's contentions in this regard are apparently founded on his view that since the adult devisees and legatees received other stock of the bank in question from the testator's estate, and paid their liability thereon, they should not now be required to even contribute to the liability attaching to the four shares now in question.

But the Receiver overlooks the fact that when the adult heirs received the shares of stock allotted to them and had the same transferred on the books of the bank to their own names, all questions as to the ownership of the stock and as to liability for the extra assessment was removed, as far as that stock was concerned. Having become record owners of the stock, with capacity to take the

same, and having obtained the benefits of such ownership for a period of several years before the bank closed, it is not perceived how the fact that they paid the extra liability on the stock so allotted to them, can have any bearing on the issue as to whether the infants should be held liable on bank stock improperly allotted to them. In effect, the adult heirs (with the support of the Receiver) ask the Court to rule that the estate which the infants received from the testator shall be depleted for the purpose of exonerating other persons, who, under a proper administration of the estate, would have become the owners of the stock, and subject to the liability attached thereto.

Respectfully submitted,

SAMUEL WANT,
Attorney for Respondents.

Darlington, S. C., December 3rd, 1934.

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SUPREME COURT OF THE UNITED STATES.

No. 434.—October Term, 1934.

J. Congdon Seabury, as Receiver of the City National Bank of Sumter, S. C., Petitioner,
vs.
Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al.

On Writ of Certiorari to the Court of Common Pleas for Sumter County, South Carolina.

[February 4, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

March 17, 1927, Moses Green of Sumter County, South Carolina, died testate. He left three sons, a daughter and a deceased son's three minor children. His will was established in probate court; the executor qualified and entered upon his duties. The residuary estate contained 20 shares of stock of the City National Bank of Sumter which were distributed by the executor and transferred on the books of the bank: four shares to each of testator's children and four to the three minors. The executor was discharged. The bank continued for several years thereafter to carry on as a going concern. Then it closed because of insolvency and was put in the hands of a receiver, the petitioner. The Comptroller made an assessment of $100 a share. No payment having been made on account of the four shares in the names of the minors, an administratrix de bonis non with the will annexed was appointed. She refused to pay the assessment. The undivided interest in real estate received by the distributees under the testator's will is worth more than $2,000, the par value of the 20 shares, and the minors' interest is worth more than $400.

Claiming under Title 12, U. S. C., §§ 64 and 66, petitioner brought this suit in the common pleas court of Sumter County against the administratrix, the sons and daughter, the minors and their guardian. He made no demand and asserted no claim against the executor. The complaint prayed judgment against the ad-

ministratrix for $400 with interest and that the property taken under the will and held by the other defendants be subjected to the claim. The trial court, following *Rutledge* v. *Stackley,* 162 S. C. 170, held the minors not personally liable because legally incapable of assuming the obligation; that if living the testator would be, and therefore his estate is, liable and that petitioner is entitled to judgment against the administratrix; that the property taken by the minors under the will should be subjected to the payment of the debt and, if not sufficient, the property distributed to and held by the testator's sons and daughter. It gave judgment for petitioner in accordance with these rulings. The administrator and minors appealed. The supreme court reversed. —S. C. —. It held the will did not direct distribution of bank stock to the minors but the executor allotted it to them in what he considered an orderly and authorized division of the estate; that, as they could not assume the obligation, their property is not liable and that, as the transfer to them was not directed by the will and the executor had no power to bind the estate, it was not liable. In support of its conclusion the court suggested that during administration there existed against testator's estate no claim in favor of the bank's creditors; that all debts of the estate were paid and that the executor was discharged without objection. And it said "we can see no reason why a claim which did not exist during the orderly administration of the estate should now be brought up years after the estate closed. . . . It does not seem that either the act of Congress or the State Statute imposing liability on stockholders in banks is sufficient to cover the very peculiar facts existing in this case."

Respondent maintains that no federal question is involved. To the extent the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina the assumption is so plainly without foundation as to suggest that it must have been inadvertently made. The court's ruling that the estate is not liable for the assessment necessarily depends upon its construction of § 66. The judgment is reviewable here under § 237 (b), Judicial Code.

For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a

part of the testator's estate. *Early* v. *Richardson,* 280 U. S. 496, 499. Cf. *McNair* v. *Darragh,* 31 F. (2d) 906. And the estate continued to be liable as a stockholder under § 66. The liability was not by the Congress intended to be limited to property actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died. *Zimmerman* v. *Carpenter,* 84 Fed. 747, 751. *Cf. Matteson* v. *Dent,* 176 U. S. 521. The obligation continues unimpaired until valid assignment of the shares by final distribution of the estate if not by an earlier transfer. *Forrest* v. *Jack,* — U. S. —, decided this day. Our attention has not been called to any South Carolina statute purporting to, and the state supreme court did not hold that any law of the State does, bar the enforcement of the assessment on the ground it was not made before the discharge of the executor. The decree of the court by which he was discharged, while having the effect of vacating the office, did not operate to extinguish the estate and so the administratrix de bonis non with the will annexed became the personal representative of the testator and is liable as the testator would be if he were living and owned the stock. As suggested in *Forrest* v. *Jack, supra,* the enforcement of liability imposed by § 66 may not be thwarted or impeded by state law. The state court failed to enforce that liability. It should have held that petitioner is entitled to judgment against the administratrix for the indebtedness owing by the estate on account of the four shares standing in the names of the minors and that the judgment be enforced against property owned by testator when he died and now held by his children and grandchildren. *Matteson* v. *Dent, supra. McNair* v. *Howle,* 123 S. C. 252, 268. *Columbia Theological Seminary* v. *Arnette,* 168 S. C. 272, 277, *et seq.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.